Public Policy Committee

Agenda

January 26, 2018

Agenda
Public Policy Committee
January 26, 2018 – 8:00 am - State Bar of Michigan, Room 2
For those joining by phone, the conference call number is 1.877.352.9775, passcode 6516204165#.

Public Policy Committee.....Jennifer M. Grieco, Chairperson

A. Reports
1. Approval of November 17, 2017 minutes
2. Public Policy Report

B. Court Rules

1. ADM File No. 2017-19: Proposed Amendment of Rules 2.410 and 2.411 and Proposed Addition of Rule 3.970 of the Michigan Court Rules

The proposed amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 would provide explicit authority for judges to order mediation in child protection proceedings.

Status: 02/01/18 Comment Period Expires
Referrals: 10/18/17 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Alternative Dispute Resolution Section; Children's Law Section; Family Law Section.
Comments: Access to Justice Policy Committee: Support with Amendments.
Comment provided to the Supreme Court included in materials.
Liaison: Erane C. Washington

2. ADM File No. 2015-26: Proposed Addition of Rule 3.808 of the Michigan Court Rules

The proposed addition of Rule 3.808 is consistent with § 56 of the Michigan Adoption Code, MCL 710.56. This new rule arises out of *In re JK*, 468 Mich 202 (2003), and *In re Jackson*, 498 Mich 943 (2015), which involved cases where a final order of adoption was entered despite pending appellate proceedings involving the adoptee children. Although the Michigan Court of Appeals has adopted a policy to suppress in its register of actions and online case search tool the names of children (and parents) who are the subject of appeals from proceedings involving the termination of parental rights, this information remains open to the public. Therefore, in order to make the determination required of this new rule, a trial court may contact the clerk of the Michigan Court of Appeals, the Michigan Supreme Court, or any other court where proceedings may be pending.

Status: 02/01/18 Comment Period Expires
Referrals: 10/18/17 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section.
Comments: Access to Justice Policy Committee: Support.
Liaison: Victoria A. Radke

3. ADM File No. 2016-13: Proposed Addition of Rule 3.810 of the Michigan Court Rules

The proposed new rule would require a court to provide an indigent putative father whose rights are terminated under the Adoption Code with transcripts for the purposes of appeal, similar to the requirement in MCR 3.977(J) for putative fathers whose rights are terminated under the Juvenile Code.

Status: 02/01/18 Comment Period Expires
Referrals: 10/18/17 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section.
Comments: Access to Justice Policy Committee: Support; Appellate Practice Section: Support with Amendments.
Liaison: Shauna L. Dunnings

4. ADM File No. 2017-18: Proposed Amendment of Rule 3.903 of the Michigan Court Rules

The proposed amendment of MCR 3.903 would make juvenile guardianship information public. This change would resolve the conflict between the child protective proceeding social file (which is considered nonpublic) and the juvenile guardianship file (which is public) and would make the rule consistent with current court practices.

Status: 02/01/18 Comment Period Expires

Referrals: 10/18/17 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Children's Law Section; Family Law Section; Probate & Estate Planning Section.

Comments: Access to Justice Policy Committee: Support.
Comment provided to the Supreme Court included in materials.

Liaison: Victoria A. Radke

5. ADM File No. 2017-08: Proposed Amendment of Rules 3.977 and 6.425 of the Michigan Court Rules

The proposed amendments of MCR 3.977(J) and MCR 6.425(G) were submitted by the Court of Appeals. The proposed amendments would require the production of the complete transcript in criminal appeals and appeals from termination of parental rights proceedings when counsel is appointed by the court. The proposed amendments would codify existing practice in many courts, and the Court of Appeals believes they would promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process.

Status: 02/01/18 Comment Period Expires

Referrals: 10/18/17 Access to Justice Policy Committee; Civil Procedure & Courts Committee; Criminal Jurisprudence & Practice Committee; Children's Law Section; Criminal Law Section; Family Law Section.

Comments: Access to Justice Policy Committee: Support; Criminal Jurisprudence & Practice Committee: Support; Appellate Practice Section: Support; Criminal Law Section: Support.

Liaison: James W. Heath

6. ADM File No. 2016-25: Proposed Amendment of Rule 7.212 of the Michigan Court Rules

The proposed amendment of MCR 7.212 was submitted by the Court of Appeals. Proposed amendments of MCR 7.212 would require an appellant to file an appendix with specific documents within 14 days after filing the appellant's principal brief. The proposal is intended to identify for practitioners the key portions of the record that the Court deems necessary for thorough and efficient review of the issues on appeal.

Status: 02/01/18 Comment Period Expires

Referrals: 10/18/17 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Civil Procedure & Courts Committee; Appellate Practice Section; Criminal Law Section; Litigation Section.

Comments: Access to Justice Policy Committee: Support; Civil Procedure & Courts Committee: Support with Amendments; Criminal Jurisprudence & Practice Committee: Support; Appellate Practice Section: Support with Amendments.
Comment provided to the Supreme Court included in materials.

Liaison: Brian D. Shekell

C. Michigan Indigent Defense Commission (MIDC)

1. MIDC Standard 8

Attorneys must have the time, fees, and resources to provide the effective assistance of counsel guaranteed to indigent criminal defendants by the United States and Michigan Constitutions. The MIDC Act calls for a minimum standard that provides: "Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided." MCL 780.991(2)(b). Fair compensation for assigned counsel may optimally be achieved through a public defender office, and the MIDC recommends an indigent criminal defender office be established where assignment levels demonstrate need, together with the active participation of a robust private bar. MCL 780.991(1)(b). In the absence of, or in combination with a public defender office, counsel should be assigned through a rotating list and be reasonably compensated. Contracted services for defense representation are allowed, so long as financial disincentives to effective representation are minimized. This standard attempts to balance the rights of the defendant, defense attorneys, and funding units, recognizing the problems inherent in a system of compensation lacking market controls.

Status: 02/01/18 Comment Period Expires.
Referrals: 11/07/17 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee: Support; Criminal Jurisprudence & Practice Committee: Support; Criminal Law Section: Support.
Comments provided to the MIDC included in materials.
Liaison: Richard D. McLellan

D. Model Criminal Jury Instructions

1. M Crim JI 10.9, 10.9a, 10.9b, 10.9c and 10.9d

The Committee proposes new instructions, M Crim JI 10.9, 10.9a, 10.9b, 10.9c and 10.9d, for the organized retail crime statutes found at MCL 752.1083 and 752.1084.

Status: 02/01/18 Comment Period Expires
Referrals: 11/27/17 Criminal Jurisprudence & Practice Committee; 11/29/17 Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee: Support with Comments.
Liaison: Hon. Cynthia D. Stephens

2. M Crim JI 11.39, 11.39a and 11.39b

The Committee proposes new instructions, M Crim JI 11.39, 11.39a and 11.39b, for the "explosives" statutes found at MCL 750.204, 750.204a, 750.207 and 750.212.

Status: 02/01/18 Comment Period Expires
Referrals: 11/27/17 Criminal Jurisprudence & Practice Committee; 11/29/17 Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee: Support as Written.
Liaison: Hon. Michael J. Riordan

3. M Crim JI 15.11a and 15.12a

The Committee proposes amendments to M Crim JI 15.11a and 15.12a, the instructions for driving with Schedule 1 or 2 substances causing death or serious injury under MCL 257.625(4), (5) and (8). The amendments are intended to correct over-broad language in paragraph (4) that included all Schedule 2 substances, where only certain of those substances are included within the purview of the statute. Deletions are in strike-through; new language is underlined.

Status: Comment Period Extended through January
Referrals: 11/27/17 Criminal Jurisprudence & Practice Committee; 11/29/17 Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee: Support with Amendment.
Liaison: Kim Warren Eddie

4. M Crim JI 17.20 and 17.20c

The Committee proposes an amendment to M Crim JI 17.20 and a new instruction, M Crim JI 17.20c, instructions for violations of MCL 750.136b(3), second-degree child abuse. The amendment to M Crim JI 17.20 is intended to conform the instruction to statutory language that was omitted in the original instruction and to make technical corrections; deletions are in strike-through; new language is underlined. The new instruction, M Crim JI 17.20c, is for second-degree child abuse charges that were committed by a child care organization where there has been a violation of MCL 722.111 et seq.

Status: Comment Period Extended through January
Referrals: 11/27/17 Criminal Jurisprudence & Practice Committee; 11/29/17 Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee: Support as Written.
Liaison: Erane C. Washington

5. M Crim JI 17.33

The Committee proposes an amendment to M Crim JI 17.33, the instruction for violations of MCL 750.145n, which was amended to expand the scope of the statute, and to make technical corrections to the first and third paragraphs. Deletions are in strike-through; new language is underlined.

Status: Comment Period Extended through January
Referrals: 11/27/17 Criminal Jurisprudence & Practice Committee; 11/29/17 Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee: Support as Written.
Liaison: Jules B. Olsman

6. M Crim JI 36.5

The Committee proposes an amendment to M Crim JI 36.5, the instruction that provides the aggravating factors found in MCL 750.462f that apply to the human trafficking instructions. The amendment accommodates an amendment to that statute. The new language is underlined.

Status: Comment Period Extended through January
Referrals: 11/27/17 Criminal Jurisprudence & Practice Committee; 11/29/17 Criminal Law Section.
Comments: Criminal Jurisprudence & Practice Committee: Support as Written.
Liaison: Daniel D. Quick

E. Legislation

1. Competency Evaluation

HB 5244 (Kesto) Mental health; other; time limitation on completion of examination to evaluate issue of incompetence to stand trial; implement. Amends sec. 1028 of 1974 PA 258 (MCL 330.2028).

HB 5246 (Kesto) Mental health; facilities; examination to evaluate issue of incompetence to stand trial; modify process and expand certain resources. Amends sec. 1026 of 1974 PA 258 (MCL 330.2026).

Status: 12/05/17 Reported Out of House Committee on Law & Justice Without Amendment.
Referrals: 11/29/17 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.
Comments: Access to Justice Policy Committee: Support; Criminal Jurisprudence & Practice Committee: Oppose; Prisons & Corrections Section: Oppose.
Liaison: Joseph J. Baumann

2. HB 4433 (Neeley) Juveniles; criminal procedure; automatic record expungement of nonviolent juvenile offenses; provide for. Amends sec. 18e, ch. XIIA of 1939 PA 288 (MCL 712A.18e).

Status: 03/29/17 Referred to House Committee on Law & Justice.
Referrals: 04/06/17 Criminal Jurisprudence & Practice Committee; Criminal Issues Initiative; Equal Access Initiative; Justice Policy Initiative; Criminal Law Section.
Comments: Access to Justice Policy Committee: Support with Recommended Amendments; Criminal Jurisprudence & Practice Committee: Oppose; Criminal Law Section: Support.
Liaison: Kim Warren Eddie

3. HB 4728 (Geiss) Criminal procedure; defenses; legal aid for individuals in deportation proceedings; establish. Creates new act.

Status: 06/08/17 Referred to House Judiciary.
Referrals: 10/10/17 Access to Justice Policy Committee; International Law Section.
Comments: Access to Justice Policy Committee: Support.
Liaison: Hon. Cynthia D. Stephens

F. Items to be Considered by the Executive Committee Before April Board Meeting

The following items will be considered by the Executive Committee before the April Board of Commissioner meeting. These items were issued by the Court late last year and sections and committees were not able to submit comments to the Board in time for the January meeting. Any Board members who want to provide input to the Executive Committee on the items below should contact either Jennifer Grieco or Peter Cunningham.

For the full text of these administrative orders, go to:
http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Pages/default.aspx

1. ADM File No. 2016-23: Proposed Amendment of Rule 2.105 of the Michigan Court Rules

The proposed amendment of MCR 2.105 would reference service on the "agent for service of process" so that it is consistent with MCL 449.1105(2).

Status: 03/01/18 Comment Period Expires
Referrals: 11/21/17: Civil Procedure & Courts Committee; Business Law Section; Consumer Law Section; Litigation Section; Negligence Law Section.

2. ADM File No. 2016-09: Proposed Amendments of Rules 3.804, 3.971, 3.977, and Addition of Rule 3.809 of the Michigan Court Rules

The proposed amendments would incorporate into both the rules concerning juvenile proceedings and adoption proceedings the requirement to notify parents that the termination of parental rights does not automatically terminate the obligation to provide support for a child. The proposed amendments also would make clear that failure to provide the notice would not affect the parent's obligation to continue to pay child support.

Status: 03/01/18 Comment Period Expires
Referrals: 11/03/17 Access to Justice Policy Committee; American Indian Law Committee; American Indian Law Section; Children's Law Section; Family Law Section.

3. ADM File No. 2016-19/2016-28: Proposed Amendments of Rules 5.125 and 5.409 of the Michigan Court Rules

The proposed amendment of MCR 5.125(C)(22) is intended to ensure that minor children of an alleged legally incapacitated person receive notice of a petition as presumptive heirs. The proposed amendments of MCR 5.125(C)(23) were submitted by the Representative Assembly of the State Bar of Michigan, and are intended to clarify the definition of persons interested in receiving a copy of a guardianship report for a minor, as referenced by MCL 700.5215. The proposed amendment of MCR 5.409 is intended to ensure that the financial institution statements and verification of funds reflect assets on hand as of the last day of the accounting period, not some time beyond that date.

Status: 04/01/18 Comment Period Expires
Referrals: 01/05/18 Civil Procedure & Courts Committee; Children's Law Section; Probate & Estate Planning Section.

4. ADM File No. 2016-42: Proposed Amendments of Rules 6.310, 6.429, and 6.431 of the Michigan Court Rules

The proposed amendments of MCR 6.310, 6.429, and 6.431 would provide a "prison-mailbox" rule for post-sentencing motions to withdraw plea, motions to correct an invalid sentence and motions for new trial, filed by *in pro per* defendants in the custody of the Department of Corrections.

Status: 04/01/18 Comment Period Expires

Referrals: 01/05/18 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section; Prisons & Corrections Section

5. ADM File No. 2016-08: Proposed Amendment of Rule 6.610 of the Michigan Court Rules

The proposed amendment of MCR 6.610 would eliminate an arguable conflict between MCR 6.610(E)(4) and MCR 6.610(E)(7).

Status: 04/01/18 Comment Period Expires

Referrals: 12/19/17 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Criminal Law Section.

6. ADM File No. 2014-36: Proposed Amendment of Rule 6.425 of the Michigan Court Rules

The proposed amendments of MCR 6.425(G) would reflect recent changes to the appellate counsel assignment process by extending and segmenting the timeframe for courts to respond to appointment requests, requiring judges to provide a statement of reason when appellate counsel is denied, encouraging courts to liberally grant untimely requests for appellate counsel in guilty plea cases, requiring the filing of all lower court transcripts and clarifying MAACS assumption of the trial courts service obligations.

Status: 03/01/18 Comment Period Expires

Referrals: 11/21/17: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section

7. ADM File No. 2016-07: Proposed Amendments of Rules 6.310, 6.428, 6.429, 6.431, 7.205, 7.211, and 7.212 of the Michigan Court Rules

The proposed amendments were submitted to the Court by the State Appellate Defender Office, which argues that they would clarify practices and provide protections for criminal defendants represented by assigned appellate counsel. The proposed amendments would allow an additional 42 days to file post-judgment motions in certain circumstances, expand MCR 6.428 to apply to both plea and trial appeals and where delay is due to the trial court, clarify in proposed amendment of MCR 7.205 that in certain circumstances, substitute appellate counsel may file a delayed application for leave to appeal within 42 days of appointment (even if later than six months after sentencing), add language to MCR 7.211 to guide parties and courts if relief is granted in the trial court, and change the procedure for seeking permission to file a brief longer than 50 pages in length.

Status: 03/01/18 Comment Period Expires

Referrals: 11/21/17: Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Appellate Practice Section; Criminal Law Section

8. ADM File No. 2016-20: Proposed Amendment of Rule 8.119 of the Michigan Court Rules

The proposed amendment of MCR 8.119 would clarify the procedure for sealing files and better accommodate protective orders issued under MCR 2.302 by clarifying that a protective order may authorize parties to file materials without also filing a motion to seal.

Status: 03/01/18 Comment Period Expires

Referrals: This was not referred because it is an SBM proposal.

9. ADM File No. 2016-30: Proposed Amendments of Rules 9.112 and 9.131 of the Michigan Court Rules
The proposed amendments of MCR 9.112 and MCR 9.131 would provide that spouses of AGC or ADB members or employees would be subject to the same procedure for review of allegations of misconduct as the Board or Commission member or employee. This change would comport with recent Supreme Court practice. These proposed amendments are intended to address any perceived conflict of interest that may exist if the procedures in MCR 9.112 were to be used to review a request for investigation of the spouse of a member or employee of the Attorney Grievance Commission or Attorney Discipline Board.
Status: 04/01/18 Comment Period Expires
Referrals: 12/19/17 Professional Ethics Committee.

10. ADM File No. 2016-45: Proposed Amendment of Rule 9.211 of the Michigan Court Rules
The proposed amendment of MCR 9.122 would establish a 56-day time period within which a grievant may file a complaint in the Supreme Court after the Attorney Grievance Commission (AGC) has dismissed a request for investigation.
Status: 04/01/18 Comment Period Expires
Referrals: 12/19/17 Professional Ethics Committee; Negligence Law Section.

11. ADM File No. 2016-31: Proposed Amendments of Rule 1.16 of the Michigan Rules of Professional Conduct
These alternative proposed amendments of MRPC 1.16(b) are intended to address the possibility of an involuntary plea as the result of an attorney's threat to withdraw as counsel for a criminal client if that client does not accept a previously offered plea (under Alternative A) or more broadly if a lawyer seeks to withdraw because the lawyer considers the client's objective repugnant or imprudent. Under the proposed amendments, the attorney would be required to advise the client that the attorney may not withdraw without permission of the court. Under Alternative A, the requirement would apply only where the client refuses to accept a previously-offered plea agreement; under Alternative B, the requirement would apply in any criminal case in which the lawyer intends to withdraw under MRPC 1.16(b)(3). These proposed amendments arose during the Court's consideration of People v Townsend, docket 153153.
Status: 04/01/18 Comment Period Expires
Referrals: 12/19/17 Access to Justice Policy Committee; Criminal Jurisprudence & Practice Committee; Professional Ethics Committee; Criminal Law Section.

12. ADM File No. 2016-46: Proposed Amendment of Rule 15 of the Rules Concerning the State Bar of Michigan
The proposed amendment of Rule 15 of the Rules Concerning the State Bar of Michigan (submitted by the SBM Representative Assembly) would increase the fee for Character & Fitness investigations to more accurately reflect the costs of performing the investigations and would update the language to reflect the online application process. According to the Bar, this would be the first increase in these fees in more than 15 years.
Status: 04/01/18 Comment Period Expires
Referrals: This was not referred because it is an SBM proposal.

MINUTES
Public Policy Committee
November 17, 2017 – 8:00 am
State Bar of Michigan, Room 2

Committee Members: Jennifer M. Grieco, Joseph J. Baumann, Shauna L. Dunnings, James W. Heath, Jules B. Olsman, Victoria A. Radke, Judge Cynthia D. Stephens, Erane C. Washington
Commissioner Guest: Donald G. Rockwell
SBM Staff: Janet Welch, Peter Cunningham, Kathryn Hennessey, Carrie Sharlow
GCSI Staff: Marcia Hune

A. Reports

1. Approval of September 27, 2017 minutes
The minutes were unanimously (7) approved.

2. Public Policy Report
The Governmental Relations staff provided a written report.

B. Court Rules

1. ADM File No. 2002-37 – Proposed Rules Related to E-Filing and Electronic Records
The amendments in this proposal are intended to begin moving trial courts toward a statewide uniform e-Filing process. The rules are required to be in place to enable SCAO's e-Filing vendor to begin programming the statewide solution. In addition, the proposal would move existing language into MCR 1.109 as a way to, for the first time, include most filing requirements in one single rule, instead of scattered in various rules. The proposal largely mirrors the administrative orders that most e-Filing pilot projects have operated under, but contains some significant new provisions. For example, courts would be required to maintain documents in an electronic document management system, and the electronic record would be the official court record.
The Access to Justice Policy Committee, Civil Procedure & Courts Committee, and Criminal Jurisprudence & Practice Committee all recommended supporting with recommended amendments. The Family Law Section recommended supporting with recommended amendments. The Probate & Estate Planning Section recommended support.
The committee voted unanimously (7) to support the proposed rules related to e-filing and electronic records, and provide to the Court all of the comments from the committees and sections for consideration.

2. ADM File No. 2014-29 – Proposed Alternative Amendments of MCR 2.602
The proposed amendments of MCR 2.602(B) would provide procedural rules regarding entry of consent judgments. Alternative A was submitted by the Representative Assembly of the State Bar of Michigan and was previously published for comment. Alternative B was developed by the Michigan District Judges Association and the Michigan Creditors Bar Association as an alternative to the published version.
The Access to Justice Policy Committee recommended supporting Alternative B with amendments. The Civil Procedure & Courts Committee recommended supporting Alternative A.
The committee voted unanimously (7) to instruct SBM staff to work in drafting an Alternative C, including elements of both Alternative A and B.

3. Proposed Amendments to Local Rules 5.3 Civil Material Filed Under Seal
The Civil Procedure & Courts Committee recommended support. The United States Courts Committee recommended supporting with recommended amendments.

The committee voted unanimously (8) to support Local Rule 5.3 with the amendments from the U.S. Courts Committee.

C. Legislation

1. HB 4754 (Barrett) Courts; jurisdiction; inter-circuit concurrent jurisdiction plan; authorize. Amends secs. 401, 405, 841 & 8304 of 1961 PA 236 (MCL 600.401 et seq.) & adds sec. 403.
The Civil Procedure & Courts Committee recommended opposition.
The committee voted unanimously that the bill was Keller permissible in its improvement in the functioning of the courts and availability of legal services to society.
The committee voted unanimously (8) to support the bill with an amendment addressing the training needs for specialty courts.

2. HB 4797 (Gay-Dagnogo) Courts; juries; jury pool selection; provide for municipalitywide jury pool under certain circumstances. Amends sec. 1301b of 1961 PA 236 (MCL 600.1301b).
The Civil Procedure & Courts Committee recommended opposing the bill as written. The Criminal Jurisprudence & Practice Committee recommended opposition.
The committee voted unanimously that the bill was Keller permissible in its improvement in the functioning of the courts.
The committee agreed to take no position. SBM staff are given permission to speak with the sponsor about this issue and look into the option of forming a task force on representation in jury pools.

3. HB 5073 (Kesto) Civil procedure; alternate dispute resolution; procedures for mediation and case evaluation of civil actions; revise. Amends heading of ch. 49 & secs. 4901, 4903, 4905, 4907, 4909, 4911, 4913, 4915, 4917, 4919, 4921 & 4923 of 1961 PA 236 (MCL 600.4901 et seq.); adds sec. 4902 & repeals ch. 49A of 1961 PA 236 (MCL 600.4951 - 600.4969).
The Civil Procedure & Courts Committee recommended opposition. The Alternative Dispute Section recommended support. The Negligence Law Section recommended opposition.
The committee voted unanimously that the bill was Keller permissible in its improvement in the functioning of the courts and availability of legal services to society.
The committee voted unanimously (8) to oppose the bill because the subject matter is only appropriate as a court rule.

D. Model Criminal Jury Instructions

1. M Crim 12.2, 12.3, 12.5, 12.6, and 12.4a
The Committee proposes amending several controlled substances instructions, M Crim JI 12.2, 12.3, 12.5 and 12.6, and adding a new instruction, M Crim JI 12.4a, to accommodate a change in the law announced in *People v Robar*, ___ Mich App ___ (2017), holding that the burden of burden of persuasion was on a defendant to prove an exemption to the Controlled Substances Act. Deletions from the current instructions are struck-through; additional language is underlined.
The Criminal Jurisprudence & Practice Committee recommended support.
The committee tabled the criminal jury instructions.

2. M Crim JI 12.9
The Committee proposes a new jury instruction, M Crim JI 12.9, for a "§ 8 defense" to possession of marijuana charges in MCL 333.26428, pursuant to *People v Hartwick*, 498 Mich 192 (2015). The instruction is entirely new.
The Criminal Jurisprudence & Practice Committee recommended support with amendments.
The committee tabled the criminal jury instructions.

3. M Crim 13.1, 13.2, and 13.5

The Committee proposes amending the resisting arrest instructions, M Crim JI 13.1, 13.2, and 13.5, to accommodate changes in the law announced in *People v Moreno*, 491 Mich 38 (2012), *People v Quinn*, 305 Mich App 484 (2014), and *People v Vanderberg*, 307 Mich App 57 (2014), regarding resistance to unlawful police conduct, and to improve the instructions' readability. Deletions from the current instructions are struck-through; additional language is underlined.

The Criminal Jurisprudence & Practice Committee recommended support.

The committee voted with one abstention to support the criminal jury instructions.

4. M Crim 15.23, 15.24, and 15.25

The Committee proposes new instructions, M Crim JI 15.23, 15.24, and 15.25, for violations of MCL 257.904(2) and (7), permitting another person to drive the defendant's car while the other person's license was suspended (and causing serious injury or death).

The Criminal Jurisprudence & Practice Committee recommended support.

The committee voted unanimously (7) to support the criminal jury instructions.

SBM STATE BAR OF MICHIGAN

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December 20, 2017

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2002-37 – Amendments of Rules 1.109, 2.107, 2.113, 2.114, 3.206, 3.901, 3.931, 3.961, 4.302, 5.113, 5.114, 6.001, 6.101, 8.117, and 8.119 of the Michigan Court Rules

Dear Clerk Royster:

At its November 17, 2017 meeting, the Board of Commissioners of the State Bar of Michigan (Board) considered the above-referenced rule amendments published for comment. In its review, the Board considered recommendations from the Criminal Jurisprudence & Practice Committee, Civil Procedure & Courts Committee, Access to Justice Policy Committee, Family Law Section, Probate & Estate Planning Section, and Appellate Practice Section. After a review of these recommendations, the Board voted unanimously to support the proposed rules with the amendments discussed below and contained in the enclosed recommendations submitted by the committees and sections. These recommendations have been summarized in a chart that is also included with this letter.

The Board strongly supports the Court's efforts to modernize court procedure and implement a state-wide e-filing system. An effective e-filing system, however, must ensure access to justice for all, including litigants who are indigent, are self-represented, or have limited or no access to e-mail or the internet. The Board believes the rules should be revised to specifically address these access to justice issues. While the State Court Administrative Office may intend on addressing these issues in the standards that are referenced in the proposed rules, these access to justice concerns are fundamental to a fair and effective e-filing system and merit being explicitly included in the court rules.

The Board endorses the other recommendations and comments made by State Bar committees and sections, which are included with this letter and summarized in the enclosed chart.

We thank the Court for its efforts in implementing a uniform e-filing system in Michigan, and we hope these comments assist with these efforts. Thank you for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President

ADM 2002-37: Electronic Filing Procedures

State Bar of Michigan Summary of Comments Made by Committees and Sections

Abbreviations for committees and sections used below:

- CIV: Civil Procedure & Courts Committee
- CJAP: Criminal Jurisprudence & Practice Committee
- ATJ: Access to Justice Committee
- PEPS: Probate & Estate Planning Section
- FLS: Family Law Section
- APS: Appellate Practice Section

MCR		Position
1.109(B)	CIV	Definition of "document" is too narrow. In proposal, the definition of document is limited to anything on 8 ½ x 11 inch paper without manipulation, meaning that anything on legal sized paper is not considered a document.
1.109(D)(1)(a)	CIV	The proposed rules are not clear as to what types of items are encompassed under the term "document." If affidavits and exhibits are considered documents, then the restrictions set forth in subsection (D)(1)(a) are problematic. First, this subsection requires that all documents are in English, which poses problems for foreign affidavits and the generally-accepted use of Latin phrases in court filings. Second, the subsection requires a minimum font size. This poses problems for certain commercial documents, such as loan documents, which are typically printed on non-standard paper and must be reduced down to 8 ½ x 11 paper, which also reduces the size of the font. The definition of document be amended to specifically exempt affidavits and exhibits. Additionally, the last sentence of this provision (which addresses affidavits) seems out of place; this sentence should be included in MCR 2.119(B), which addresses the form of affidavits.
1.109(D)(1)(b)	PEPS	Require email address, if known, to caption requirements. In addition, a request for email addresses should be added to court forms.
	ATJ	Amend to allow self-represented who has PPO or similar criminal order or who wishes to request order of confidential address in the pending case to use mailing address rather than residential address, and revise SCAO forms accordingly.
1.109(D)(1)(c)	CIV	For clarity, define "case initiating document" used here and throughout the rule proposal.
1.109(D)(2)(b)	CJAP	Remove requirement that prosecutors inform the court whether or not there are any pending or resolved cases in any jurisdiction that involve a minor child of the family or individual family member of the defendant should be removed. Prosecutors have no way of knowing or verifying this information, and it would be difficult to ascertain such information for a juvenile case.

MCR		Position
1.109(D)(2)(c)	PEPS	Remove family case inventory requirement from probate proceedings.
1.109(D)(3)	CIV	This provision would be better placed in MCR 2.119(B), which addresses the form of affidavits.
	PEPS	The list of documents previously identified in MCR 5.114(B)(1) as requiring authentication by verification under oath or penalties of perjury needs to be reinstated either in the modified MCR 1.109 or within the probate rules. These documents are not all specifically identified in the rules other than in MCR 5.114(B)(1); therefore the current language of 1.109(D)(3) effectively removes the signing requirement.
1.109(D)(8)	CIV	The provisions set forth for filing documents under seal conflict with a proposed court rule amendment that was approved by the RA and was recently published for comment by the Court in ADM 2016-20. This rule proposal would allow parties who have designated materials as confidential under protective orders to file those documents under seal without having to file a motion to seal. It is important for the Court to address this issue to prevent parties from being forced to file layers of motions to seal documents that have already been deemed confidential. Further, subsection (D)(8) is not consistent with MCR 8.119(I); these rules should be amended to be consistent with each other.
	CJAP	Amend the requirement that the person filing documents under seal "serve copies of the motion, each document to be sealed, and the proposed order on all parties." This provision is overly broad and would require that prosecutors serve criminal defendants investigational documents, such as investigative subpoenas, search warrants, and affidavits. These items should not be subject to disclosure to defendant and should be excluded from this rule.
1.109(G)(3)-(6)	APS	Amend the rules so that electronic service is not contingent on the clerk's approval or rejection of a filing. Instead, the e-filing system should immediately serve a copy of any document submitted for filing upon all other counsel or record and unrepresented parties.
1.109(G)(3)(b)	PEPS	Create a separate rule to provide for greater specificity on allowing documents to be sent electronically, such as inventory information.
1.109(G)(3)(c)	ATJ	Expand and better define the "good cause" exemption to e-filing requirements by directing courts to consider: • Individuals with no access to an electronic device; • Individuals who must travel a certain distance to access a public computer; • Individuals facing a lack of transportation or other limitations on the ability to travel; • Individuals facing safety issues; and • Age or disability limitations.

MCR		Position
	PEPS	Create separate rule for probate proceedings regarding good cause exception for items that do not have to be filed electronically, such as original wills.
1.109(G)(5)	CIV	Amend the rules to not allow litigants the option to "uncheck" e-filers to receive service. When filing a document, Oakland County and Wayne County e-filing systems allow parties to uncheck and not serve individuals who have signed up for electronic service. While this option could serve a purpose for *ex parte* motions, pro per individuals, who do not fully understand service requirements, could uncheck opponents or opposing counsel. This creates procedural problems because the opposing party may not receive notice that a motion has been filed. While there may not be a one-size-fits-all solution to this problem, for regular motions, e-filers should not have the option of unchecking opponents for electronic service.
1.109(G)(5)(a)(i)	ATJ	Amend rule to explicitly account for individuals who opt out of e-filing. Language is proposed in the enclosed ATJ Policy's position.
1.109(G)(5)(a)(ii)	ATJ	Amend to require that the court clerk notifies the party of an error and provide time to correct the filing, as is done in the Court of Appeals.
1.109(G)(5)(a)(iii)	PEPS	Interplay between a statewide system (technical) rejection (MCR 1.109(G)(5)(c)) and a subsequent notification by a court of rejection for substantive reasons (jurisdiction, venue, etc.) (MCR 1.109(G)(5)(a)(iii)) must be clarified.
	APS	Amend the rules to create a specific procedure for resubmitting corrected filings to address the conflicts in MCR 1.109(D)(6) (allowing clerk to reject filings), MCR 1.109(G)(5)(a)(iii) (electronically filed document is filed when submitted in system), and MCR 1.109(G)(5)(a)(iii) (a rejected document is not part of the record) and protect parties' substantive and the appeals process, as more fully discussed in the Appellate Practice Section's position.
1.109(G)(5)(b)	CIV	From a judicial administration perspective, accepting a filing at the time of transmission being completed may not be workable. For example, in probate courts, pro per individuals make multiple mistakes when filing documents concerning guardianship or conservatorship proceedings and the clerk's office needs to send back a lot of filings before the filing is acceptable for filing.
	ATJ	Amend rule to account for delays parties experience in the approval of the fee waiver request for filing fee. Language proposed in ATJ Policy's position.
1.109(G)(5)(c)	PEPS	Clarify protocols for notification of the rejection of a filing must be developed, including the following issues: • Should an SCAO e-form\notification be created? (this would address statewide technical rejections) • The interplay between a statewide system (technical) rejection (MCR 1.109(G)(5)(c)) and a subsequent notification by a court of rejection

MCR		Position
		for substantive reasons (jurisdiction, venue, etc.). (MCR 1.109(G)(5)(a)(iii)) must be clarified.
1.109(G)(6)	PEPS	E-service process issues must also be addressed. Simultaneous e-service (which the filing system has the capability to perform) cannot be utilized if the hearing date is not available when the pleading is filed. MCR 1.109(G)(6). For example, when a party submits a motion for filing but the court sets a hearing date, simultaneous e-service will require the court to create and serve the notice of hearing separately from other documents once a date has been assigned. In addition, there are instances when a party may not want to immediately serve a document that has been filed with the court. The same issue for e-service process relates to e-service transactions. A probate court rule amendment is desirable.
1.109(G)(6)(a)(ii)	ATJ	Amend rule to provide an exception for individuals who do not have electronic devices. Amend – possibly in MCR 1.109(g)(6)(v) – to include a provision requiring that courts accommodate service by other means for litigants who do not have regular access to an email address. Amend rules to require courts to accommodate filing fees paid by any method, not just by credit card. Language for these amendments is proposed in ATJ Policy's position.
1.109(G)(7)	ATJ	Streamline the process to account for transmission errors. In addition, SCAO should create a form to make it easier for self-represented litigants.
3.206	FLS	Include additional captioning language for domestic relations actions. Language proposed in Family Law Section position.
5.113(A)	ATJ	Amend to clarify that litigants are not required to use SCAO forms, and amend to account for litigants without electronic devices.
6.101(A)(6)	CJAP	Remove requirement that prosecutors inform the court whether or not there are any pending or resolved cases in any jurisdiction that involve a minor child of the family or individual family member of the defendant should be removed. Prosecutors have no way of knowing or verifying this information, and it would be difficult to ascertain such information for a juvenile case.
8.117	ATJ	Amend rule to allow the court clerk can assist a self-represented litigant with selecting a case-type code and such assistance is not considered legal advice.
8.119(C)	ATJ	Amend rule to account for individuals who are exempt from e-filing requirements. Language proposed in ATJ Policy's position.
8.119(J)(2)	CIV	Charging a reproduction fee for all copies raises access to justice concerns, particularly for in pro per litigants who may not have an e-mail address or regular access to their e-mail. The rules should be amended to require courts to provide the first copy free to e-filers, as is done in the federal e-filing system.

MCR		Position
N/A	PEPS	A separate rule should be enacted to provide greater detail on how to address proof of service and e-service probate filings in probate proceedings.
N/A	PEPS	For probate cases, consideration should be given on how to handle instances where there are multiple interested persons that require service of documents throughout the life of a case, but not all individuals become registered users of the e-filing system.

Public Policy Position
ADM File No. 2002-37

The Civil Procedure & Courts Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed herein is that of the Civil Procedure & Courts Committee only and not the State Bar of Michigan. The State Bar position in this matter is to support the proposed rules with the amendments recommended by the State Bar committees and sections.

The Civil Procedure & Courts Committee has a public policy decision-making body with 26 members. On November 11, 2017, the Committee adopted its position after a discussion and vote at a scheduled meeting. 18 members voted in favor of the Committee's position on 2002-37, 0 members voted against this position, 0 members abstained, 8 members did not vote due to absence.

The Civil Procedure & Courts Committee Supports ADM File No. 2002-37 with Recommended Amendments.

Explanation

The committee supports the Court's great efforts to implement a state-wide electronic filing system and applauds the Court's efforts to consolidate filing rules in one spot. The committee, however, has a number of recommendations with regard to the rule proposal.

- The committee was generally concerned how these rule amendments could potentially limit access to the court by the average person who does not have experience with e-filing procedures.
- MCR 1.109(B): The definition of "document" appears too narrow. In the proposed amendments, the definition of document is limited to anything on 8 ½ x 11 inch paper without manipulation, meaning that anything on legal sized paper would not be considered a document.
- MCR 1.109(D)(1)(a): The proposed rules are not clear as to what types of items are encompassed under the term "document." If affidavits and exhibits are considered documents, then the restrictions set forth in subsection (D)(1)(a) are problematic. First, this subsection requires that all documents are in English, which poses problems for foreign affidavits and the generally-accepted use of Latin phrases in court filings. Second, the subsection requires a minimum font size. This poses problems for certain commercial documents, such as loan documents, which are typically printed on non-standard paper and must be reduced down to 8 ½ x 11 paper, which also reduces the size of the font. The committee recommends that the definition of document be amended to specifically exempt

affidavits and exhibits. Additionally, the last sentence of this provision (which addresses affidavit) seems out of place. The committee recommends including this sentence in MCR 2.119(B), which addresses the form of affidavits.

- MCR 1.109(D)(1)(c): In this subsection and throughout the rule proposal, the term "case initiating document" is used; however, this term is not defined. For clarity, the committee recommends defining this term.

- MCR 1.109(D)(3): While the committee agrees with the substance of the provisions in subsection (D)(3), the committee believes that these provisions would be better placed in MCR 2.119(B), which addresses the form of affidavits.

- MCR 1.109(D)(8): The provisions set forth for filing documents under seal conflict with a proposed court rule amendment that the Representative Assembly approved and is pending before the Court that would allow parties who have designated materials as confidential under protective orders to file those documents under seal without having to file a motion to seal. It is important for the Court to address this issue to prevent parties from being forced to file layers of motions to seal documents that have already been deemed confidential. Further, subsection (D)(8) is not consistent with MCR 8.119(I); these rules should be amended to be consistent with each other.

- MCR 1.109(G)(5): For the electronic filing process, the committee is concerned that the Court will adopt certain problematic aspects of the Oakland and Wayne counties e-filing systems. These systems contain an option for e-filers to uncheck and not serve certain individuals who have signed up for electronic service. While this could serve a purpose for *ex parte* motions, the committee is concerned that pro per individuals who do not fully understand service requirements could uncheck opponents or opposing counsel. This creates procedural problems because the opposing party may not receive notice that a motion has been filed. While there may not be a one-size-fits-all solution to this problem, for regular motions, e-filers should not have the option of unchecking opponents for electronic service.

- MCR 1.109(G)(5)(b): From a judicial administration perspective, accepting a filing at the time of transmission being completed may not be workable. For example, in probate courts, pro per individuals make multiple mistakes when filing documents concerning guardianship or conservatorship proceedings and the clerk's office needs to send back a lot of filings before the filing is acceptable for filing.

- MCR 8.119(J)(2): Charging a reproduction fee for all copies raises access to justice concerns, particularly for in pro per litigants who may not have an e-mail address or regular access to their e-mail. The committee recommends that the rules require courts to provide the first copy free to e-filers, as is done in the federal e-filing system.

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Public Policy Position
ADM File No. 2002-37

The Criminal Jurisprudence & Practice Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed herein is that of the Criminal Jurisprudence & Practice Committee only and not the State Bar of Michigan. The State Bar position in this matter is to support the proposed rules with the amendments recommended by the State Bar committees and sections.

The Criminal Jurisprudence & Practice Committee has a public policy decision-making body with 17 members. On October 20, 2017, the Committee adopted its position after a discussion and vote at a scheduled meeting. 10 members voted in favor of the Committee's position on 2002-37, 0 members voted against this position, 1 member abstained, 6 members did not vote due to absence.

The Criminal Jurisprudence & Practice Committee Supports ADM File No. 2002-37 With Amendments.

Explanation

The committee supports the proposed amendments set forth in ADM No. 2002-37, subject to two amendments.

First, in MCR 1.109(D)(2)(b) and 6.101(A)(6), the requirement that prosecutors inform the court whether or not there are any pending or resolved cases in any jurisdiction that involve a minor child of the family or individual family member of the defendant should be removed. Prosecutors have no way of knowing or verifying this information, and it would be difficult to ascertain such information for a juvenile case.

Second, MCR 1.109(D)(8) contains a requirement that the person filing documents under seal "serve copies of the motion, each document to be sealed, and the proposed order on all parties." This provision is overly broad and would require that prosecutors serve criminal defendants investigational documents, such as investigative subpoenas, search warrants, and affidavits. These items should not be subject to disclosure to defendant and should be excluded from this rule.

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Public Policy Position
ADM File No. 2002-37

The Access to Justice Policy Committee is comprised of members appointed by the President of the State Bar of Michigan. The position expressed herein is that of the Access to Justice Policy Committee only and not the State Bar of Michigan. The State Bar position in this matter is to support the proposed rules with the amendments recommended by the State Bar committees and sections.

The Access to Justice Policy Committee has a public policy decision-making body with 26 members. On November 14, 2017, the Committee adopted its position after a discussion and vote at a scheduled meeting. 21 members voted in favor of the Committee's position on 2002-37, 0 members voted against this position, 1 member abstained, 4 members did not vote due to absence.

The Access to Justice Policy Committee Supports ADM 2002-37 with Amendments.

Explanation
The committee supports the Court's efforts to implement a state-wide electronic filing system. The committee, however, has a number of recommendations for the proposed rules.

1. **MCR 1.109(G)(3)(c): Expand and Better Define the Good Cause Exception to E-Filing Requirement.**

The committee believes that the "good cause" standard for opting out of electronic filing must be broadened and more clearly defined. MCR 1.109(G)(3)(c) makes electronic filing mandatory unless good cause is shown; however, "good cause" for an exception is not defined by the rules. The committee recommends that the good cause exception to the e-filing requirement be defined and expanding to encompass the following:

- Individuals with no access to an electronic device;
- Individuals who must travel a certain distance to access a public computer;
- Individuals facing a lack of transportation or other limitations on the ability to travel;
- Individuals facing safety issues; and
- Age or disability limitations.

In addition, the committee recommends that the rules should include the following public access court requirement: "Each court shall provide sufficient public access terminals to enable reasonable access

to e-filing, and/or sufficient personnel to provide clerk-aided e-filing for litigants seeking to file paper documents."

2. **MCR 1.109(D)(1)(b)(vi): Allow Protected Parties to Use Mailing Address Rather than Residential Address.**

The committee recommends that MCR 1.109(D)(1)(b)(vi) be amended to allow a self-represented party who is under the protection of a PPO or other similar criminal order or who wishes to request an order of confidential address in the pending case to use a mailing address which does not have to be their residential address and SCAO forms should be revised accordingly to explain this option.

As proposed, MCR 1.109(D)(1)(b)(vi) requires all court documents to include "name, address, and telephone number of each party appearing without an attorney." This is problematic from a domestic violence context where addresses and other contact (identifying) information should not be available to the public.

As proposed, this rule will create negative unintended consequences. For example, under the Uniform Child Custody Jurisdiction and Enforcement Act, a party may request that identify information not be disclosed if a party's or minor child's health, safety or liberty would be at risk by the disclosure. However, if a self-represented party is required to disclose his or her name address, and telephone number on this request for non-disclosure, the harm is already done. And a party's failure to comply with the requirements of MCR 1.109(D)(1)(vi) may result in their pleading being rejected by the clerk.

Parties under the protection of a PPO should be permitted to use a mailing address, which does not have to be their residential address, for their protection. Similar accommodations for protected parties are allowed in other rules. For example, MCR 3.703(B)(6) permits a PPO petitioner to omit her residential address, but must provide a mailing address.

For these reasons, the committee recommends amending MCR 1.109(D)(1)(b)(vi) to allow self-represented parties who are under the protection of a PPO or other similar criminal order or who wishes to request an order of confidential address in the pending case to use a mailing address, rather than their residential address, in documents filed in court and to amend the SCAO forms accordingly.

3. **MCR 1.109(G)(5)(a)(i): Amend to Address Individual Who Opt Out of E-Filing.**

The committee recommends amending MCR 1.109(G)(5)(a)(i) to explicitly account for individuals who opt out of e-filing as follows (suggested additions shows in underline and bold):

> Specified case information, including email address for achieving electronic service **or a mailing address if opting out of electronic service,** shall be provided . . .

4. **MCR 1.109(G)(5)(a)(ii): Require Clerk to Notify Party of Error with Time to Correct.**

The committee recommends that the MCR 1.109(G)(5)(a)(ii) be amended to require that the court clerk notifies the party of an error and provide time to correct the filing, as is done in the Court of Appeals.

As proposed, MCR 1.109(G)(5)(a)(ii) places the responsibility on the user to confirm submission and any errors are presumed to the be fault of the user; however, this is unduly burdensome to self-represented individuals who are computer illiterate.

5. MCR 1.109(G)(5)(b): Amend to Account for Delays in Approval of Fee Waiver Requests

The committee recommends that MCR 1.109(G)(5)(b) be amended to account for delays parties experience in the approval of the fee waiver request for filing fee, as follows (suggested additions shown in bold and underline):

> A document submitted electronically is considered filed with the court when the transmission to the electronic-filing system is completed and the required filing fees have been paid or **an application for waiver has been filed** ~~waived~~.

The filing date should be the date that the document was filed and request for waiver was filed; the filing date should not be based on the date that the waiver was granted by the court. This prejudices indigent filers. In certain courts, including Wayne County, there can be significant delays between the filing of the request for waiver and the court actually granting the waiver.

6. MCR 1.109(G)(6): Amend to Accommodate Individuals Without Access to Electronic Devices or Credit Cards.

The committee recommends that subsection (6)(a)(ii) be amended to provide an exception for individuals who do not have electronic devices, as follows (suggested additions shown in bold and underline):

> Service of process of all other documents electronically filed shall be accomplished electronically among authorized users through the electronic-filing system **and through regular mail or personal service for litigants not engaged in electronic service.**

The rule should also be amended – possibly in MCR 1.109(g)(6)(v) – to include a provision requiring that courts accommodate service by other means for litigants who do not have regular access to an email address, as follows (suggested additions shown in bold and underline):

> **Courts must accommodate service by means other than electronic service for litigants lacking an e-mail address that is able to be access regularly. Such litigants may opt out of electronic service by submitting an Opt-Out of Electronic Service form to the Clerk.** [form TBD by SCAO].

In addition, the rules should require courts to accommodate filing fees paid by any method, not just by credit card, by providing (suggested additions shown in bold and underline):

> **Courts must accommodate filing fees to be paid by any method, not just by credit card.**

7. MCR 1.109(G)(7): Streamline the Process for Dealing with Transmission Failures.

The committee believes that the process set forth in the rule seems excessive and overly complex particularly for a self-represented party. The rule should be amended to streamline the process to account for these types of errors. In addition, SCAO should create a form to make it easier for self-represented litigants.

8. MCR 5.113(A): Amend to Clarify that Litigants Are Not Required to Use SCAO Forms and to Account for Parties Without Electronic Devices.

As proposed, the rule requires that "[d]ocuments must be substantially in the form approved by the SCAO if a form has been approved for the use." The committee is concerned that the language of the rule could be interpreted to require litigants to only use SCAO forms. This could cause problems for practitioners, as many practitioners regularly use forms provided by local courts, rather than SCAO forms.

In addition, this rule should explicitly provide protections for individuals without electronic devices.

9. MCR 8.117: Allow Clerks to Assist E-Filings with Non-Legal Advice.

The committee recommends that this be amended to provide that the court clerk can assist a self-represented litigant with selecting a case-type code and such assistance is not considered legal advice.

10. MCR 8.119(C): Account for Individuals Exempt from E-Filing.

In proposed MCR 8.119(c), the clerk may reject filings not accompanied by a filing fee, "unless waived or suspended by court order;" however, similar to the concern raised in Paragraph 4 above, the rule should account for those who are exempt from electronic filing, as follows (suggested additions shown in bold and underline):

> The clerk of the court may only reject documents that do not comply with MCR 1.109(D), are not signed in accordance with MCR 1.109(e) or are not accompanied by a filing fee **or fee waiver request**.

11. The Rules Should Set Forth Procedure for Obtaining Fee Waiver Under E-Filing System.

The committee is also concerned with the lack of procedure for filing and obtaining a fee waiver under the new electronic filing rules. Must the fee waiver request be filed electronically? If so, what about parties who request an exemption from e-filing? What's the process? How long will it take? Will a filing date be preserved pending approval of a fee waiver?

In addition, the court rules should require immediate conditional acceptance of a fee waiver and attached pleadings upon filing, or immediate acceptance of fee waivers for litigants who are statutorily required to have fees waived (there's talk of connecting the e-filing system to the DHHS computers so that number can be instantaneously checked) and a short time period for deciding all other fee waivers.

12. The Rules Should Be Revised to Better Address Self-Represented and Indigency Issues.

The committee recommends that the rules be reviewed to better address self-represented and indigency issues. While SCAO may be well-intentioned in its internal efforts to accommodate self-represented and indigency issues in the e-filing process, there should be a court rule backing up these efforts with more specificity.

Number who voted in favor and opposed to the position:
When the committee voted on ADM 2002-37, it offered members two alternatives when dealing with e-filing exemptions for self-represented individuals: (1) provide a blanket exemption for self-represented individuals to the e-filing requirements or (2) broaden and expand the good cause exemption to e-filing already contained in the proposed rules. 7 members preferred the blanket exemption alternative, and 14 members preferred the broadening and better defining good cause alternative.

With regard to the recommendations set forth in paragraphs 2 through 12, the committee supported the amendments as above.

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Public Policy Position
ADM File No. 2002-37

The Probate & Estate Planning Section is a voluntary membership section of the State Bar of Michigan, comprised of 3,645 members. The Probate & Estate Planning Section is not the State Bar of Michigan and the position expressed herein is that of the Probate & Estate Planning Section only and not the State Bar of Michigan. The State Bar position in this matter is to support the proposed rules with the amendments recommended by the State Bar committees and sections.

The Probate & Estate Planning Section has a public policy decision-making body with 23 members. On November 11, 2017, the Section adopted its position after a discussion and vote at a scheduled meeting. 19 members voted in favor of the Section's position on 2002-37, 0 members voted against this position, 0 members abstained, 4 members did not vote.

The Probate & Estate Planning Section Supports ADM File No. 2002-37.

Explanation
ADM File No. 2002-37 – E-Filing and Electronic Records Court Rule Amendments

The rules are required to be in place to enable SCAO's e-Filing vendor to begin programming the statewide solution. In addition, the proposal would move existing language into MCR 1.109 as a way to, for the first time, include most filing requirements in one single rule, instead of scattered in various rules. The proposal largely mirrors the administrative orders that most e-Filing pilot projects have operated under, but contains some significant new provisions. For example, courts would be required to maintain documents in an electronic document management system, and the electronic record would be the official court record.

Our review has identified a number of issues with the amendments. Some of the issues will have an immediate impact on probate cases if the proposed rules are not modified. Other issues are identified here in order to create awareness on the part of the Supreme Court and the State Court Administrative Office (SCAO) that the items must be addressed as these rules become refined. It is likely that drafts of specific proposed probate court rule amendments will be developed for submission by the committee.

Please note that the following is an initial list, which will be refined and likely be added to over time:

- The email address, if known, should be added to the required caption information. MCR 1.109(D)(1)(b).

- While not a court rule issue, a line\request for e-mail addresses must be added to court forms.
- The list of documents previously identified in 5.114(B)(1) as requiring authentication by verification under oath or penalties of perjury needs to be reinstated either in the modified 1.109 or within the probate rules. These documents are not all specifically identified other than in 5.114(B)(1), therefore the current language of 1.109(D)(3) effectively removes the signing requirement.
- The new requirement contained in MCR 1.109(D)(2)(c) to include a family case inventory should be removed in relation to probate proceedings. This information has little relevance in relation to probate proceedings such as decedent estates, trusts and mental health cases. The additional filing requirement could also prove onerous to parties in many instances where they do not have access to such information. Currently, many filers simply leave this information blank on guardianship forms because they do not know the information.
- Proof of service\e-service for probate filings must be addressed in greater detail. A separate rule must be created or provisions made part of an existing court rule.
- Greater specificity is necessary on allowing documents to be sent electronically for other than filing (i.e., inventory info, etc.). A separate rule must be created or provisions made part of an existing court rule. MCR 1.109(G)(3)(b).
- A separate rule should be created for probate proceedings regarding the good cause exception\safe harbor for items that do not have to be filed electronically. It is imperative that the issue of filing original wills be addressed as part of this issue. MCR 1.109(G)(3)(c).
- Clarification regarding protocols for notification of the rejection of a filing must be developed, including the following issues:
    - Should an SCAO e-form\notification be created? (this would address statewide technical rejections)
    - The interplay between a statewide system (technical) rejection (MCR 1.109(G)(5)(c)) and a subsequent notification by a court of rejection for substantive reasons (jurisdiction, venue, etc.). (MCR 1.109(G)(5)(a)(iii)) must be clarified.
- E-service process issues must also be addressed. Simultaneous e-service (which the filing system has the capability to perform) cannot be utilized if the hearing date is not available when the pleading is filed. MCR 1.109(G)(6). For example, when a party submits a motion for filing but the court sets a hearing date, simultaneous e-service will require the court to create and serve the notice of hearing separately from other documents once a date has been assigned. In addition, there are instances when a party may not want to immediately serve a document that has been filed with the court. Simultaneous service also removes a party's option to serve a document only after they know the court has officially accepted it for filing.
- The same issue for e-service process relates to e-service transactions. A probate court rule amendment is desirable.

- Consideration needs to also be given on how to handle instances where there are multiple interested persons that require service of documents throughout the life of a case, but not all individuals become registered users of the e-filing system.

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Public Policy Position
ADM File No. 2002-37

The Family Law Section is a voluntary membership section of the State Bar of Michigan, comprised of 2,859 members. The Family Law Section is not the State Bar of Michigan and the position expressed herein is that of the Family Law Section only and not the State Bar of Michigan. The State Bar position in this matter is to support the proposed rules with the amendments recommended by the State Bar committees and sections.

The Family Law Section has a public policy decision-making body with 21 members. On November 16, 2017, the Section adopted its position after a discussion and vote at a scheduled meeting. 15 members voted in favor of the Section's position on 2002-37, 0 members voted against this position, 0 members abstained, 6 members did not vote.

The Family Law Section Supports ADM File No. 2002-37 with Recommended Amendments.

Explanation

Generally speaking, the Family Law Council supports the proposed Court Rule amendments of ADM File No. 2002-37. However, not every single proposed rule change in ADM File No. 2002-37 will impact Family Law/Domestic Relations practice. The Family Law Section's supportive vote and comments are limited to those provisions that we believe will have an impact on our practice. The Family Law Council voted in favor of the following changes in ADM File No. 2002-37, as written:

- MCR 1.109, generally;
- MCR 1.109(D)(2)(c)(ii) regarding Family Inventory;
- MCR 1.109(D)(8) regarding standards for filing documents under seal;
- MCR 2.107, 2.113, and 2.114
- MCR 3.206(A) regarding labels for pleadings and identifying information for minor children;
- MCR 3.206(B) regarding Verified Statements;
- MCR 3.901, 3.931, and 3.961 regarding captioning in delinquency cases
- MCR 8.119(D)(4) regarding the Official Court Record

The Family Law Council takes no position with regard to the following proposed amendments in ADM File No. 2002-37:

- MCR 4.302

- MCR 5.113
- MCR 5.114
- MCR 6.001
- MCR 6.101
- MCR 8.117

The Family Law Section also recently voted on a proposed amendment to MCR 3.206(D) & (E) , which would impact captioning in Domestic Relations matters. This vote occurred within the past year, and was independent of ADM File No. 2002-37. The proposed language is relevant to the proposed changes in ADM File No. 2002-37, and the Family Law Council believed this would be a good opportunity to introduce these changes, and make them part of the ADM File No. 2002-37 package as a "Friendly Amendment". This proposal would only affect captioning in Domestic Relations/Family Law cases. The following is the specific language the Family Law Council would like to see proposed:

MCR 3.206

[(A) -(C) unchanged]

(D) Designation of Parties. The party who initiates a case by a complaint or petition is designated as the Petitioner and the responding party is designated as the Respondent. Parties who initiate a case by a joint petition are designated as Petitioner A and Petitioner B. These designations will remain the same throughout the action and in any postjudgment proceedings. To the extent that court rules outside of subchapter 3.200 are applicable to Domestic Relations Actions, the term "plaintiff" will mean petitioner, and "defendant" will mean respondent.

(E) Captions. In an action for divorce, separate maintenance or annulment, the case caption must be substantially in the following form: "Regarding the Marriage of [petitioner's name] and [respondent's name or joint petitioner's name]." In actions for child support or child custody which are not divorce, separate maintenance, or annulment cases, the caption must be in substantially the following form: "Regarding the Child[ren] of [petitioner's name] and [respondent's name or joint petitioner's name]." In an action for paternity or revocation of paternity, the case caption will be as set forth in MCR 2.113(C)(1), except that the filing party will be designated as petitioner, and the responding party as respondent.

Contact Person: Christopher Harrington
Email: christopherj26@gmail.com

Public Policy Position
ADM File No. 2002-37

The Appellate Practice Section is a voluntary membership section of the State Bar of Michigan, comprised of 819 members. The Appellate Practice Section is not the State Bar of Michigan and the position expressed herein is that of the Appellate Practice Section only and not the State Bar of Michigan. The State Bar position in this matter is to support the proposed rules with the amendments recommended by the State Bar committees and sections.

The Appellate Practice Section has a public policy decision-making body with 24 members. On November 21, 2017, the Section adopted its position after an e-discussion and vote. 19 members voted in favor of the Section's position on 2002-37, 0 members voted against this position, 0 members abstained, 5 members did not vote.

The Council supports the uniform set of rules that the Court has adopted for the new statewide e-filing system, but wishes to share two main concerns for the Court's consideration as it works to implement the new rules.

1. ***Defect Correction Procedure Needed.*** Under new MCR 1.109(D)(6), a court clerk may reject filings that do not conform to MCR 8.119. Although new MCR 1.109(G)(5)(b) would provide that "a document submitted electronically is considered filed with the court when the transmission to the electronic-filing system is completed," and that "[r]egardless of the date a filing is accepted by the clerk of the court, the date of the filing is the date submitted," it is not clear how those provisions affect new MCR1.109(G)(5)(a)(iii), which states that "[a] rejected document is not part of the official court record."

   Without a specific procedure for resubmitting corrected filings, the Council is concerned that a clerk's ability to reject a filing can result in the loss of substantive rights. For example, if a complaint is filed on the last day of a limitations period and is rejected the next day, any attempt to correct the defect may be futile, since the opposing party could interpose a limitations defense to a corrected-but-late complaint.

   This procedure can also create problems with the record on appeal. For example, if a party unsuccessfully opposes a motion on the papers, and that party's brief is later rejected, the brief will not be part of the record. If the party attempts to file a corrected, conforming brief, it may be after the briefing deadline, which may create problems for properly preserving issues for appeal.

   If the Court believes that clerks should retain the power to reject filings, then the Council respectfully submits that the Court should adopt a defect-correction procedure that allows a party to file a corrected pleading or paper within a set time, and provide that a corrected filing filed in compliance with the procedure will be deemed filed on the date and at the time of the original filing.\

2. ***Simultaneous Electronic Service.*** It is unclear from new MCR 1.109(G)(3)(a)(i), MCR 1.109(G)(5)(a)(iii), MCR 1.109(G)(6)(a)(ii), and MCR 1.109(G)(6)(b)–(c), whether a document is electronically served on other parties when submitted for filing or after a clerk approves or rejects a filing. The Council respectfully submits that electronic service of a document should not be contingent upon a clerk's approval or rejection of a filing. The e-filing system should immediately serve a copy of any document submitted for filing upon all other counsel of record and unrepresented parties.

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48933-2012

December 20, 2017

Larry S. Royster
Clerk of the Court
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

RE: ADM File No. 2014-29: Proposed Amendment of Rule 2.602 of the Michigan Court Rules

Dear Clerk Royster:

At its December 12, 2017 meeting, the Executive Committee of the State Bar of Michigan considered the above-referenced rule amendment published for comment. In its review, the Executive Committee considered recommendations from the Civil Procedure & Courts Committee and the Access to Justice Committee.

After its review, the Executive Committee voted unanimously to propose amendments to Alternative B to expand the scope of the rule to apply to pocket judgments as well as conditional dismissals. In addition, the Executive Committee supports amendments that (1) remove the requirement that the terms of the settlement agreement be placed on the record and (2) change "defendant" to "breaching party" and "plaintiff" to "non-defaulting party."

The Executive Committee supports the following amendments to proposed Alternative B for MCR 2.602 (additions shown in bold underline and deletions shown in strikethrough):

(A)-(B) [Unchanged.]

(C) Conditional Dismissal. The court may enter a consent order for conditional dismissal under the following conditions:

(1) A consent order for conditional dismissal shall be signed and approved by all parties and shall clearly state the terms ~~of the settlement agreement and provide for an order~~ for reinstatement of the case and entry of judgment ~~if defendant defaults on the terms of the settlement agreement~~.

(2) If the **breaching party**~~defendant~~ defaults on the terms of the settlement agreement **as provided for in the conditional dismissal order**, the **non-defaulting party**~~plaintiff~~ may seek entry of an order for reinstatement of the case and entry of judgment.

(a) To obtain an order for reinstatement of the case and entry of judgment, the **non-defaulting party**~~plaintiff~~ shall file with the court an affidavit stating that the **breaching party** ~~defendant~~ defaulted on the terms of the settlement agreement.

(b) ~~Plaintiff~~ **The non-defaulting party** shall serve a copy of an affidavit of non-compliance on **the breaching party** ~~defendant~~ at **its**

~~defendant's~~ current address listed in the court records and file proof of service with the court.

(c) **If the order for conditional dismissal states that judgment may be entered without notice or further process, the court shall enter the proposed judgment upon determining the conditions for entry of judgment in the conditional dismissal order are satisfied.**

(d) **If the order for conditional dismissal does not provide for immediate entry of judgment,** ~~t~~The affidavit shall be accompanied by a notice to ~~defendant~~**breaching party** that an order for reinstatement and for entry of judgment is being submitted to the court for entry if no written objections to its accuracy or completeness are filed with the court clerk within 14 days after service of the notice. Unless ~~**defendant requests a hearing**~~ **an objection is filed** within 14 days after service of the notice, an order for reinstatement of the case and entry of judgment shall be signed by the court and entered.

(~~d~~e) **An objection** ~~**request for hearing**~~ **must be verified and** state with specificity the reasons that an order for reinstatement of the case and entry of judgment should not enter.

(~~e~~f) **If an objection is filed,** ~~t~~The **non-breaching party** ~~**court**~~ shall set a hearing ~~**to determine whether the defendant has complied with the settlement agreement**~~ and ~~**mail**~~ **serve** notice of that hearing to all parties.

(3) For the purposes of any statute of limitation, an action conditionally dismissed under this rule is deemed to have been initiated on **the** date the original complaint was properly filed.

(4) All parties to a conditional dismissal bear the affirmative duty to inform the court with jurisdiction over that case of any change of address until the terms of the settlement agreement have been satisfied.

(C)-(D) [Unchanged, but relettered as (D) & (E)]

We thank the Court for the opportunity to comment on the proposed amendments.

Sincerely,

Janet K. Welch
Executive Director

cc: Anne Boomer, Administrative Counsel, Michigan Supreme Court
Donald G. Rockwell, President

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November 29, 2017

David J. Weaver
Court Administrator
United States District Court
For the Eastern District of Michigan
505 Theodore Levin United States Courthouse
231 West Lafayette Boulevard
Detroit, MI 48226

RE: Comment on Proposed Local Rule 5.3

Dear Mr. Weaver:

On November 17, 2017, the State Bar of Michigan Board of Commissioner (the Board) considered the proposed amendments to Local Rule 5.3. In reaching its decision, the Board considered recommendations from its United State Courts Committee and Civil Procedure & Courts Committee.

After its review, the Board voted unanimously to support, with further recommended amendments, the proposed amendments to Local Rule 5.3, as the proposed changes provide litigants, attorneys, and judges clear guidance on the process for sealing documents in light of *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016).

The Board offers the following recommendations for further amendments to Local Rule 5.3:

- In subsection (b)(2), strike the "narrowly tailored" condition, as it is unnecessary and may lead to confusion. It is sufficient for the rule to require that the motion to seal comport with controlling case law and the rule itself.

- In the 2017 comments, strike the last sentence regarding third parties, as it is unnecessary and possibly inconsistent with the terms of the protective order.

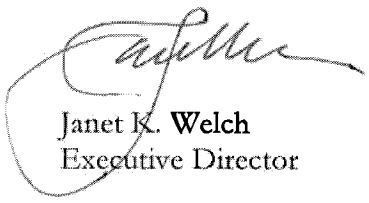
- The 2017 comments suggest that, in deciding a motion to file under seal, the court will consider whether the movant could have filed a redacted document in lieu of seeking to seal it. If this is the case, amend the rule to make this clear, so that the movant understands that it has the burden to explain why redaction alone is not an adequate alternative.

- Standardize the use of "subrule," "subsection," and "section," to avoid confusion.

Attached is a redline that incorporates these recommended changes as well as a number of small stylistic amendments.

We thank the Court for the opportunity to convey the Board's position.

Sincerely,



Janet K. Welch
Executive Director

cc: Donald G. Rockwell, President, State Bar of Michigan

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
505 THEODORE LEVIN UNITED STATES COURTHOUSE
231 W. LAFAYETTE BOULEVARD
DETROIT, MICHIGAN 48226

DAVID J. WEAVER
COURT ADMINISTRATOR
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DIVISIONAL OFFICES
ANN ARBOR
BAY CITY
FLINT
PORT HURON

NOTICE OF PROPOSED AMENDMENTS TO LOCAL RULES

At their regular meeting on October 2, 2017, the Judges of the United States District Court for the Eastern District of Michigan approved for publication and comment amendments to LR 5.3, Civil Material Filed Under Seal.

Please note the proposed amendments to LR 5.3 consist of substantial changes, essentially substituting and replacing the existing rule. The text of the proposed rule is below. To review the existing rule, please visit the Court's website at www.mied.uscourts.gov.

In order to be assured consideration, comments in writing, which may include recommended changes to the proposed amended rule, should be received by the Court no later than December 1, 2017. Comments may be sent to LocalRules@mied.uscourts.gov or to Local Rules, 505 Theodore Levin United States Courthouse, 231 W. Lafayette Boulevard, Detroit, Michigan 48226.

LR 5.3 Civil Material Filed Under Seal

(a) Sealing Items Authorized by Statute or Rule. When a statute or a rule other than this rule authorizes filing a document or other item under seal in a civil case, the item may be filed without a court order, according to the following procedure:

(1) A separate notice of filing under seal must be filed before filing ~~an~~ a document or other item under seal.

(2) The notice must ~~include~~:

(A) ~~a citation of~~ cite the statute or rule authorizing the seal;

(B) ~~an~~ identify~~ication~~ and describe~~ption~~ ~~of~~ each item submitted under seal; and

(C) ~~a statement~~ establish~~ing~~ that ~~the~~ each items ~~are~~ is within the statute or rule authorizing the sealing.

(b) Sealing Items Not Authorized by Statute or Rule.

(1) Except as ~~allowed~~ authorized by statute or rule, documents (including settlement agreements) or other items may not be sealed except by court order. Absent a court order permitting sealing, no item proposed for sealing may be ~~A party or other person may not~~ filed or tendered to the clerk for filing under seal except under subsection (3)(A)(v) of this subrule~~an item proposed for sealing under this subrule unless the Court enters an order permitting sealing~~.

(2) A party or other person seeking to file a document or other item under seal in a civil case under this ~~subsection~~ subrule must file and serve a motion to authorize sealing as provided in this subrule~~that is narrowly tailored to seek sealing in accord with applicable law~~.

~~(2)~~

(3) Procedure for Moving to File Under Seal.

(A) Motion. Any motion to file under seal must be in accordance with controlling legal authority and contain:

(i) an index of documents or other items ~~which are~~ proposed for sealing and, as to each document or item, whether any other party objects;

(ii) a description of any non-party or third-party privacy interests that may be affected if the documents or portions thereof to be sealed were publicly disclosed on the court record;

(iii) whether the proposed sealed material was designated as 'confidential' under a protective order and by whom;

(iv) for each proposed sealed ~~exhibit or~~ document, a detailed analysis, with supporting evidence and legal citations, demonstrating that the request to seal satisfies controlling legal authority;

(v) a redacted version of the document(s) to be sealed, filed as an exhibit to the motion, unless the proponent of filing is seeking to file the entire document under seal, in which case a blank sheet shall be filed as an exhibit. The redacted version must be clearly marked by a cover sheet or other notation identifying the document as a "REDACTED VERSION OF DOCUMENT(S) TO BE SEALED"; and

(vi) an unredacted version, filed as a sealed exhibit, of the document that is sought to be filed under seal. Such ~~Under to this subsection, the unredacted version may be filed~~ filing under seal is allowed for the limited purpose of resolving the motion to seal without a prior court order. The unredacted version must be clearly marked by a cover sheet or other notation identifying the document as an "UNREDACTED VERSION OF DOCUMENT(S) TO BE SEALED PURSUANT TO LR 5.3(b)(3)(~~B~~A)(~~iii~~vi)." The unredacted version must clearly indicate, by highlighting or other method, the portions of the document ~~which~~ that are the subject of the motion.

(B) If the Court has not ruled on the sealing motion by the time the underlying filing must be made (e.g., a motion or brief or exhibits attached thereto), the document proposed to be sealed may be filed in redacted form in ~~said filing shall have redactions matching those submitted under~~ in accordance with ~~section~~ subrule (b)(3)(A)(v).

(C) Disposition of Sealing Motion.

(i) The Court may grant a motion to seal only upon a finding of a compelling reason why certain documents or portions thereof should be sealed.

(ii) If the Court grants the sealing motion in whole or in part, the Court's sealing order shall specifically reference each document (or portion thereof) as to which sealing was granted. These documents may be considered by the Court with regard to the underlying filing. The moving party shall promptly file each document authorized for sealing in lieu of or as an exhibit to the underlying filing.

(iii) If the Court denies in part or in whole the sealing motion:

(1) The unredacted documents filed under seal under section (B)(iii) remain sealed for purposes of preserving the record with regard to the court's ruling on the sealing motion.

~~(2)~~ The court will not consider or rely on the unredacted version of the documents sought to be sealed and as to which the sealing motion was denied, unless the moving party promptly files the unredacted version.

(2)

(3) The court may determine that it can rule on the underlying filing without regard to any documents sought to be sealed and as

to which sealing was denied (i.e., based upon the redacted document), in which case it may rule on the filing without further action by the parties.

(4) The court may determine that justice requires, in order to adjudicate the underlying filing, that a party file additional materials. The court may adjust briefing and hearing schedules accordingly.

(iv) Statements made in any motions or responses to motions filed under this rule are not admissible by any party to prove or disprove any element of a disputed claim or to impeach by a prior inconsistent statement or contradiction. An order adjudicating a motion filed under this rule does not create any presumption on any substantive issue in the case.

(c) Unsealing Documents. When the Court orders an item unsealed, the clerk will make it publicly available as any other public document.

COMMENTS: Attorneys are cautioned that attempts to circumvent this rule may result in the imposition of sanctions.

Sealed settlement agreements are covered by LR 5.3(c)(1). Generally, except in extraordinary circumstances, the sealing of settlement agreements is disfavored.

Protective orders are covered under LR 26.4.

The delivery of papers filed under seal to Federal Court facilities must be in accordance with LR 83.31(a)(3)(B). (7/1/08)

Other material provided by statute, e.g., Qui Tam cases, are not covered by this rule.

Documents filed electronically must comply with the Court's ECF Policies and Procedures (Appendix ECF to these rules).

COMMENTS TO 2017 REVISIONS:

Attorneys are cautioned that there is a strong presumption in favor of openness as to court records. The burden of overcoming this presumption is borne by

the party that seeks to seal documents on the court record. The burden is a heavy one and only the most compelling reasons can justify non-disclosure of judicial records.

For further guidance on the legal standards governing filing under seal, see *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299 (6th Cir. 2016), *Beauchamp v. Fed. Home Loan Mortgage Corp.*, 658 Fed. App'x 202 (6th Cir. 2016), and *Rudd Equipment Co. v. John Deere Const. & Forestry Co.*, 834 F.3d 589 (6th Cir. 2016).

Parties are encouraged to consider redactiong ~~of~~ documents prior to filing ~~to excise those portions which are deemed confidential and thus avoid~~ as an alternative to a sealing motion. Parties are expected to confer in detail before a sealing motion is filed in order to reduce the number of documents which are the subject of the motion and to otherwise reach agreement on the relief requested. ~~Third parties which produced documents under a protective order should be notified, in accord with the terms of the protective order, should a party wish to file the third-party's documents.~~

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November 29, 2017

Samuel R. Smith, III
Committee Reporter
Michigan Supreme Court
Committee on Model Criminal Jury Instructions
Michigan Hall of Justice
P.O. Box 30052
Lansing, MI 48909

RE: Proposed Model Criminal Jury Instructions 13.1, 13.2, and 13.5
Proposed Model Criminal Jury Instructions 15.23, 15.24, and 15.25

Dear Mr. Smith:

At its November 17 meeting, the Board of Commissioners of the State Bar of Michigan considered the above-referenced model criminal jury instructions published for comment. In its review, the Board considered recommendations from the Criminal Jurisprudence & Practice Committee. The Board voted unanimously to support the proposed criminal jury instructions as published.

Thank you for the opportunity to convey the Board's position.

Sincerely,

Janet K. Welch
Executive Director

cc: Donald G. Rockwell, President

SBM STATE BAR OF MICHIGAN

To: Board of Commissioners

From: Governmental Relations Division Staff

Date: January 17, 2018

Re: Governmental Relations Update

This memo includes updates on legislation and court rules on which the State Bar has taken positions.

Legislation

SB 385 – Engagement of Staff Attorneys by Licensed Debt Collection Agencies

SB 385 initially proposed allowing collection agencies to hire in-house counsel to represent third party clients in court, raising unauthorized practice of law concerns. The Board voted to oppose SB 385 at its September 27, 2017 meeting. State Bar staff worked with the bill's sponsor, Senate staff, and other stakeholders to ensure an amended version of the bill (S-1 version) was introduced to address the Board's unauthorized practice concerns. The S-1 version passed both the Senate and House and was signed into law on December 28, 2017. The legislation will go into effect on March 13, 2018.

Court Rules

ADM File No. 2016-11: Amendment of MCR 3.208

The proposed amendments to MCR 3.208 sought to streamline the process for setting contempt proceedings by allowing an alternative procedure. The Executive Committee voted to support the proposed amendments. On December 20, 2017, the Court issued an order adopting the proposed amendments, effective January 1, 2018.

Michigan Indigent Defense Commission (MIDC)

Jonathan Sacks, Executive Director of the MIDC, has accepted the position of Director of SADO and will be departing the MIDC at the end of this month. Loren E. Khogali, currently employed by the Federal Defender Office for the Eastern District of Michigan, has been offered the job to be the new executive director, and is expected to begin next month.

The MIDC met in late December and early January to review the first set of compliance plans submitted by 132 court system funding units. These compliance plans covered the first four standards that were approved by LARA in early 2017. Each submitted plan included a cost analysis. Under the MIDC Act, local funding units would be responsible for continuing to pay the same amount for indigent defense as they spent in the three years prior to the passage of the act, and the state would be required to fund the balance. The approved standards (and compliance plans) would not have to be implemented until the state share of the funding is provided.

The 132 submissions can be divided into three general categories:

- Plans and cost analysis approved outright (17)
- Plans approved, but cost analysis not approved (84)
- Plans and cost analysis not approved (19)

In aggregate, the cost analyses totaled in the submitted plans totaled approximately $87 million. The total cost of the approved plans (and cost analyses) is close to $7 million.

The next step is for the plans and cost analyses that have not been approved to be resubmitted by the local system, and the MIDC will review the resubmitted plans in March or April. After that, the MIDC will put together a budget request to the Michigan Legislature for the state share of the compliance plans.

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

Stephen J. Markman,
Chief Justice

ADM File No. 2017-19

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

Proposed Amendment of Rules 2.410
and 2.411 and Adoption of New Rule 3.970
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rules MCR 2.410 and 2.411of the Michigan Court Rules and adoption of MCR 3.970. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 2.410 Alternative Dispute Resolution

(A) Scope and Applicability of Rule; Definitions.

(1) [Unchanged.]

(2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; child protection mediation under MCR 3.974; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B)-(F) [Unchanged.]

Rule 2.411 Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases. MCR 3.970 governs mediation in child protective proceedings.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

[New] MCR 3.970 Child Protection Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to the mediation of child protective proceedings.

(2) "Mediation" includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power.

(B) ADR Plan. Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B).

(C) Order for Mediation.

(1) At any stage in the proceedings, after consultation with the parties, the court may order that a case be submitted to mediation.

(2) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation.

(3) Unless the specific rule under which the case is referred provides otherwise, in addition to other provisions the court considers appropriate, the order shall:

(a) specify, or make provision for selection of, the mediation provider; and

(b) provide time limits for initiation and completion of the mediation process.

(4) The order may require attendance at mediation proceedings as provided in subrule (D).

(D) Objections to Mediation. A party may object to an order to mediate by filing a motion.

A motion must be decided before the parties meet at a mediation session.

(E) Attendance at Mediation Proceedings.

(1) Attendance of Counsel. The court may direct that the attorneys representing the parties attend mediation proceedings. If the attorney representing a party is unable to attend, another attorney associated with the representing attorney may attend, but must be familiar with the case.

(2) Presence of Parties. The court may direct that the parties to the action and other persons:

(a) be present at the mediation proceeding or be immediately available by some other means at the time of the proceeding; and

(b) have information and authority adequate for responsible and effective participation in the proceeding for all purposes.

The court's order may specify whether the availability is to be in person or by other means.

(3) Except for legal counsel, the parties may not bring other persons to the mediation session unless permission is first obtained from the mediator, after notice to opposing counsel.

(4) Failure to appear. The failure of a party to appear in accordance with this rule may be considered a contempt of court.

(F) Selection of the Mediator.

(1) The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (H). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case. If the parties do not stipulate to a particular mediator, the court may select a Community Dispute Resolution Program (CDRP) center or other mediator who meets the requirements of subrule (H).

(2) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must

promptly disclose any potential basis for disqualification.

(G) Scheduling and Mediation Process.

(1) Scheduling. The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected. Upon receipt of the court's order, the CDRP center or mediator shall promptly confer with the parties to schedule mediation in accordance with the order. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court.

(3) Mediation Process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. Mediation participants may ask to meet separately with the mediator throughout the mediation process. The mediation will continue until: an agreement is reached, the mediator determines that an agreement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears to the mediator that the process may result in an agreement.

(4) Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time.

(5) Completion of Mediation. Within two days after the completion of the mediation process, the CDRP center or the mediator shall so advise the court, stating only: the date of completion of the process, who appeared at the mediation, whether an agreement was reached, and whether further mediation proceedings are contemplated. If an agreement was reached, the CDRP center or the mediator shall submit the agreement to the court within 14 days of the completion of mediation.

(6) Agreements reached in mediation are not binding unless the terms are incorporated in an order of the court or placed on the record.

(7) Confidentiality. Confidentiality in the mediation process is governed by MCR 2.412. However, previously uninvestigated allegations of abuse or neglect identified during the mediation process are not confidential and may be disclosed.

(H) Qualification of Mediators.

(1) To be eligible to serve as a mediator in child protection cases, a person must meet the following minimum qualifications:

(a) Complete a general civil or domestic relations mediation training program approved by the State Court Administrator providing the generally accepted components of mediation skills;

(b) Have one or more of the following:

(i) Juris doctor degree, graduate degree in conflict resolution or a behavioral science, or 5 years of experience in the child protection field; or

(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Upon completion of the training required under subrule (H)(1)(a), observe two general civil or domestic relations mediation proceedings conducted by an approved mediator, and conduct one general civil or domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(d) Complete a 15-hour advanced training program on child protection mediation practice and an 8-hour training program on domestic violence screening approved by the State Court Administrator.

(2) Approved mediators are required to complete 8 hours of advanced mediation training during each 2-year period.

(3) Additional requirements may not be imposed upon mediators.

Staff Comment: The proposed amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 would provide explicit authority for judges to order mediation in child protection proceedings.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-19. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017

Clerk

Public Policy Position
ADM 2017-19

The Access to Justice Policy Committee Supports ADM 2017-19 with Amendments

Explanation

ADM 2017-19 proposes a new rule granting judges authority to order mediation in child protection cases and sets forth the mediation process.

In general, mediation can be a useful tool in child protection cases and has the potential, in appropriate cases, to lead to a better outcome for a parent than trial. The rule provides a number of provisions that are protective of parties, including parties who are subject to domestic violence, including:

- mediation is nonbinding;
- unless the court holds a hearing, the court shall not refer a case to mediation if there is a PPO or other protective order;
- parties may otherwise object to a mediation order; and
- mediators are required to screen for domestic violence using the SCAO protocol.

The committee, however, offers the following recommendations to further improve the child protection mediation process, which are also detailed in the attached redline of the rule proposal:

1. The committee recommends that fees are addressed in MCR 3.970(C)(3). Under the proposed rule, the court has the authority to appoint a mediator and the parties may stipulate to a mediator. However, the rule is silent on apportionment of costs, if any. The committee recommends that the rule provide for cost sharing between parties. In addition, the committee recommends adding the following language to protect low-income parties:

   > If a party qualifies for a waiver or suspension of fees under MCR 2.002 or the court determines that the party is unable to pay the cost of the mediator provider and free or low-cost mediation services are not available, the court shall not order a party to pay any portion of the mediation fees.

2. The committee recommends that the Court add grounds for objections to mediation in MCR 3.970(D). A central principle of mediation is that parties must have the capacity to meaningfully participate in the process to reach a mutually satisfactory resolution. The rule already accounts for cases where a PPO exists; however, there are many other reasons why a case may not be appropriate for mediation. Additionally, where parties have taken significant steps toward resolving the issues, mediation may not be necessary or helpful and this should be a ground to object. The committee recommends inserting language from MCR 3.216(D), the domestic relations mediation rule, that sets out specific reasons for objecting in addition to a ground based on past efforts (subparagraph (e) below):

   > Cases may be exempt from mediation on the basis of the following:

(a) domestic abuse, unless attorneys for both parties will be present at the mediation session;
(b) inability of one or both parties to negotiate for themselves at the mediation, unless attorneys for both parties will be present at the mediation session;
(c) reason to believe that one or both parties' health or safety would be endangered by mediation;
(d) a showing that the parties have made significant efforts to resolve the issues such that mediation is likely to be unsuccessful; or
(e) for other good cause shown.

3. The committee recommends that the rules require all mediators to meet the qualifications requirements set out in MCR 3.970(H), unless parties can show an agreed mediator is otherwise qualified. As proposed, MCR 3.970(H) provides that qualifications for mediators include (1) completion of SCAO mediation training; (2) a JD, graduate degree or 5 years' experience in child protection; or 40 hours of mediation experience over two years; (3) observation of two mediation proceedings; and (4) 15 hours advanced training on child protection mediation and 8 hours on domestic violence screening. However, MCR 3.970(F)(1) provides that a mediator agreed upon by the parties need not meet the qualifications requirement. While parties may feel more comfortable with a particular mediator, it is also important that mediators have the knowledge and expertise to assist parties in resolving their dispute. For these reasons, the committee recommends the following (or similar language) be added at the end of the second sentence of MCR 3.970(F)(1):

> "... provided that the parties can demonstrate to the court that the mediator is otherwise qualified for the specific issues in the case."

4. The committee is concerned that the proposed rules may raise due process concerns, specifically with regards to plea agreements. In *In re Wagler*, 498 Mich 911 (2015), the parties reached a mediation agreement with a provision that the respondent would enter a plea and the adjudication would be held in abeyance. When the respondent failed to comply with services, the court entered an order taking jurisdiction (without advising her of her rights) and terminated parental rights. The Michigan Supreme Court reversed the court of appeals affirmance, holding that the manner in which the court assumed jurisdiction violated due process because it failed to satisfy itself that the plea (in the mediation agreement) was knowingly made. In order to address this due process concern with respect to plea agreement, the committee recommends that MCR 3.970(G)(6) be amended to require any mediation agreement to comply with MCR 3.971, which requires the court to advise a parent of the effect of a plea.

5. The committee also recommends that parties to the mediation are fully advised of confidentiality issues. In *In re Brock*, 442 Mich 101 (1993), the Michigan Supreme Court held that under child protection law, MCL 722.631, privilege (except attorney-client) is abrogated and may not be used to exclude privileged statements as evidence in a proceeding. There is no easy solution to this issue and because on substantive issues statutes takes precedent over court rules, it's unclear whether this court rule protection for confidentiality will prevail a legal challenge. Therefore, the committee recommends that the court rule require mediators to

advise parents of the limits of confidentiality under the court rules and MCL 722.631 so at least they will be aware.

6. The committee recommends that the court correct the following typographical error: The added language should reference "MCR 3.970" rather than "MCR 3.974."

Number who voted in favor and opposed to the position:
Voted For position: 21
Voted against position: 0
Abstained from vote: 2
Did note vote: 3

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

Stephen J. Markman,
Chief Justice

ADM File No. 2017-19

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

Proposed Amendment of Rules 2.410
and 2.411 and Adoption of New Rule 3.970
of the Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rules MCR 2.410 and 2.411of the Michigan Court Rules and adoption of MCR 3.970. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 2.410 Alternative Dispute Resolution

(A) Scope and Applicability of Rule; Definitions.

(1) [Unchanged.]

(2) For the purposes of this rule, alternative dispute resolution (ADR) means any process designed to resolve a legal dispute in the place of court adjudication, and includes settlement conferences ordered under MCR 2.401; case evaluation under MCR 2.403; mediation under MCR 2.411; domestic relations mediation under MCR 3.216; child protection mediation under MCR ~~3.974~~ 3.970; and other procedures provided by local court rule or ordered on stipulation of the parties.

(B)-(F) [Unchanged.]

Rule 2.411 Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to cases that the court refers to mediation as provided in MCR 2.410. MCR 3.216 governs mediation of domestic relations cases. MCR 3.970 governs mediation in child protective proceedings.

(2) [Unchanged.]

(B)-(G) [Unchanged.]

[New] MCR 3.970 Child Protection Mediation

(A) Scope and Applicability of Rule; Definitions.

(1) This rule applies to the mediation of child protective proceedings.

(2) "Mediation" includes dispute resolution processes in which a neutral third party facilitates communication between parties, assists in identifying issues, and helps explore solutions to promote a mutually acceptable settlement. A mediator or facilitator has no authoritative decision-making power.

(B) ADR Plan. Each trial court that submits child protective proceedings to mediation processes under this rule shall either incorporate the process into its current ADR plan, or if the court does not have an approved ADR plan, adopt an ADR plan by local administrative order under MCR 2.410(B).

(C) Order for Mediation.

(1) At any stage in the proceedings, after consultation with the parties, the court may order that a case be submitted to mediation.

(2) Unless a court first conducts a hearing to determine whether mediation is appropriate, the court shall not refer a case to mediation if the parties are subject to a personal protection order or other protective order. The court may order mediation without a hearing if a protected party requests mediation.

(3) Unless the specific rule under which the case is referred provides otherwise, in addition to other provisions the court considers appropriate, the order shall:

(a) specify, or make provision for selection of, the mediation provider; ~~and~~

(b) provide time limits for initiation and completion of the mediation process; AND

~~(b)~~(c) PROVIDE FOR PAYMENT OF COSTS OF MEDIATION. IF A PARTY QUALIFIES FOR A WAIVER OR SUSPENSION OF FEES UNDER MCR 2.002, OR THE COURT DETERMINES THAT THE PARTY IS UNABLE TO PAY THE COST OF

MEDIATION AND FREE MEDIATION SERVICES ARE NOT REASONABLY AVAILABLE, THE COURT SHALL NOT ORDER A PARTY TO PAY ANY PORTION OF THE MEDIATION FEES.

(4) The order may require attendance at mediation proceedings as provided in subrule (D).

(D) Objections to Mediation. A party may object to an order to mediate by filing a motion. CASES MAY BE EXEMPT FROM MEDIATION ON THE BASIS OF THE FOLLOWING:

(1) DOMESTIC ABUSE, UNLESS ATTORNEYS FOR BOTH PARTIES WILL BE PRESENT AT THE MEDIATION SESSION;

(2) INABILITY OF ONE OR BOTH PARTIES TO NEGOTIATE FOR THEMSELVES AT THE MEDIATION, UNLESS ATTORNEYS FOR BOTH PARTIES WILL BE PRESENT AT THE MEDIATION SESSION;

(3) REASON TO BELIEVE THAT ONE OR BOTH PARTIES' HEALTH OR SAFETLY WOULD BE ENDANGERED BY MEDIATION;

(4) A SHOWING THAT THE PARTIES HAVE MADE SIGNIFICANT EFFORTS TO RESOLVE THE ISSUES SUCH THAT MEDIATION IS LIKELY TO BE UNSUCCESSFUL; OR

(5) FOR OTHER GOOD CAUSE SHOWN.

A motion must be decided before the parties meet at a mediation session.

~~(D)~~(E) Attendance at Mediation Proceedings.

(1) Attendance of Counsel. The court may direct that the attorneys representing the parties attend mediation proceedings. If the attorney representing a party is unable to attend, another attorney associated with the representing attorney may attend, but must be familiar with the case.

(2) Presence of Parties. The court may direct that the parties to the action and other persons:

(a) be present at the mediation proceeding or be immediately available by some other means at the time of the proceeding; and

(b) have information and authority adequate for responsible and effective participation in the proceeding for all purposes.

The court's order may specify whether the availability is to be in person or by other means.

(3) Except for legal counsel, the parties may not bring other persons to the mediation session unless permission is first obtained from the mediator, after notice to opposing counsel.

(4) Failure to appear. The failure of a party to appear in accordance with this rule may be considered a contempt of court.

~~(E)~~(F) Selection of the Mediator.

(1) The parties may stipulate to the selection of a mediator. A mediator selected by agreement of the parties need not meet the qualifications set forth in subrule (H). The court must appoint a mediator stipulated to by the parties, provided the mediator is willing to serve within a period that would not interfere with the court's scheduling of the case AND PROVIDED THE PARTIES CAN DEMONSTRATE TO THE COURT, AND THE COURT FINDS, THAT THE MEDIATOR IS OTHERWISE QUALIFIED FOR THE SPECIFIC ISSUES IN THE CASE. If the parties do not stipulate to a particular mediator, the court may select a Community Dispute Resolution Program (CDRP) center or other mediator who meets the requirements of subrule (H).

(2) The rule for disqualification of a mediator is the same as that provided in MCR 2.003 for the disqualification of a judge. The mediator must promptly disclose any potential basis for disqualification.

~~(F)~~(G) Scheduling and Mediation Process.

(1) Scheduling. The order referring the case for mediation shall specify the time within which the mediation is to be completed. A copy of the order shall be sent to each party, the CDRP center or the mediator selected. Upon receipt of the court's order, the CDRP center or mediator shall promptly confer with the parties to schedule mediation in accordance with the order. The mediator may direct the parties to submit in advance, or bring to the mediation, documents or summaries providing information about the case.

(2) The mediator must make reasonable inquiry as to whether either party has a history of a coercive or violent relationship with the other party. Throughout the mediation process, the mediator must make reasonable efforts to screen for the presence of coercion or violence that would make mediation physically or emotionally unsafe for any participant or that would impede achieving a voluntary and safe resolution of issues. A reasonable inquiry includes the use of the domestic violence screening protocol for mediators provided by the State Court Administrative Office as directed by the Supreme Court.

(3) Mediation Process. The mediator shall discuss with the parties and counsel, if any, the facts and issues involved. Mediation participants may ask to meet separately with the mediator throughout the mediation process. The mediation will continue until: an agreement is reached, the mediator determines that an agreement is not likely to be reached, the end of the first mediation session, or until a time agreed to by the parties. Additional sessions may be held as long as it appears to the mediator that the process may result in an agreement.

(4) Following their attendance at a mediation session, a party may withdraw from mediation without penalty at any time.

(5) Completion of Mediation. Within two days after the completion of the mediation process, the CDRP center or the mediator shall so advise the court, stating only: the date of completion of the process, who appeared at the mediation, whether an agreement was reached, and whether further mediation proceedings are contemplated. If an agreement was reached, the CDRP center or the mediator shall submit the agreement to the court within 14 days of the completion of mediation.

(6) Agreements reached in mediation are not binding unless the terms are incorporated in an order of the court or placed on the record AND THE COURT COMPLIES WITH MCR 3.971.

(7) Confidentiality. Confidentiality in the mediation process is governed by MCR 2.412. However, previously uninvestigated allegations of abuse or neglect identified during the mediation process are not confidential and may be disclosed. THE MEDIATOR SHALL ADVISE THE PARTIES, ORALLY AND IN WRITING, OF THE RULES REGARDING CONFIDENTIALITY UNDER MCR 2.412 AND MCL 722.631.

~~(G)~~(H) Qualification of Mediators.

(1) To be eligible to serve as a mediator in child protection cases, a person must meet the following minimum qualifications:

(a) Complete a general civil or domestic relations mediation training program approved by the State Court Administrator providing the generally accepted components of mediation skills;

(b) Have one or more of the following:

(i) Juris doctor degree, graduate degree in conflict resolution or a behavioral science, or 5 years of experience in the child protection field; or

(ii) 40 hours of mediation experience over two years, including mediation, co-mediation, observation, and role-playing in the context of mediation.

(c) Upon completion of the training required under subrule (H)(1)(a), observe two general civil or domestic relations mediation proceedings conducted by an approved mediator, and conduct one general civil or domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(d) Complete a 15-hour advanced training program on child protection mediation practice and an 8-hour training program on domestic violence screening approved by the State Court Administrator.

(2) Approved mediators are required to complete 8 hours of advanced mediation training during each 2-year period.

(3) Additional requirements may not be imposed upon mediators.

Staff Comment: The proposed amendments of MCR 2.410 and MCR 2.411 and adoption of the new MCR 3.970 would provide explicit authority for judges to order mediation in child protection proceedings.

The staff comment is not authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-19. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017

Clerk

From: Bcaprathe <bcaprathe@netscape.net>
Sent: Wednesday, November 01, 2017 11:51 AM
To: ADMcomment
Cc: Jane; John Stark
Subject: Fwd: Using Mediation in Foster Care Cases (ADM2017-19).

I wholeheartedly agree oh the all the reasons stated by "Mediation.com" in the below comments titled "Using Mediation in Foster Care Cases." I would be happy to testify accordingly, if necessary.
Thanks,
Bill Caprathe

Begin forwarded message:

From: "Mediation.com/Arbitration.com" <info@mediation.com>
Date: November 1, 2017 at 10:12:35 AM EDT
To: bcaprathe@netscape.net
Subject: Using Mediation in Foster Care Cases

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William, in this issue...

Using Mediation in Foster Care Cases

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Mediation is an effective tool when dealing with family law issues. In the last few years, the use of mediation in foster care, adoption and dependency and neglect cases has risen exponentially. More communities recognize the efficacy of this tool, spurring them to adopt new mediation programs to address these issues. The traditional adversarial process involved in foster care and child protection cases often has inherent shortcomings that do not serve the best interests of the child or the parties involved. As such, mediation provides an effective alternative.: Read more

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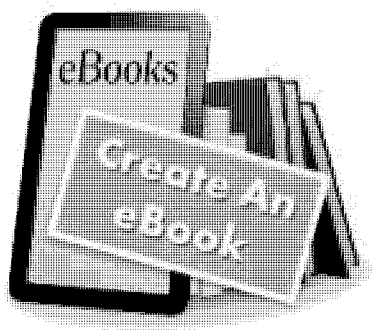

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who fully participate in the process, it is more likely that they will arrive at a longer-lasting agreement that will help avoid more litigation in the future. The agreement can outline terms that are more acceptable to all the parties. Read more

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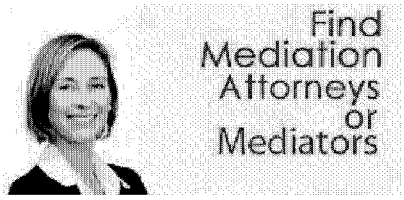

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Using Mediation in Foster Care Cases

Posted on September 11, 2017

Mediation is an effective tool when dealing with family law issues. In the last few years, the use of mediation in foster care, adoption and dependency and neglect cases has risen exponentially. More communities recognize the efficacy of this tool, spurring them to adopt new mediation programs to address these issues. The traditional adversarial process involved in foster care and child protection cases often has inherent shortcomings that do not serve the best interests of the child or the parties involved. As such, mediation provides an effective alternative.

In mediation, the parties can freely discuss the issues that are important to them. The process is confidential, so they do not have to worry about saying things that can be used against them in court. Biological parents and foster parents may have grievances to air and concerns they wish to address, such as drug problems, discipline issues or a lack of contact. They can also communicate about difficult emotions in a safe environment. Meanwhile, attorneys involved can work together to solve the unique problems facing the family in an honest and candid manner without being concerned about how these issues will reflect on their clients in a court setting.

Foster care mediation involves specially trained objective professionals who help facilitate communication between the parties. Other people concerned about the child's welfare may also be brought into the

conversation, such as social workers or extended family members. During the mediation process, the mediator helps identify issues that need to be resolved. He or she then helps the parties solve these problems. Solutions may involve creating a safety plan, establishing a visitation schedule, considering how to address financial needs and other creative solutions. If the parties are able to reach an agreement, this agreement is memorialized in writing.

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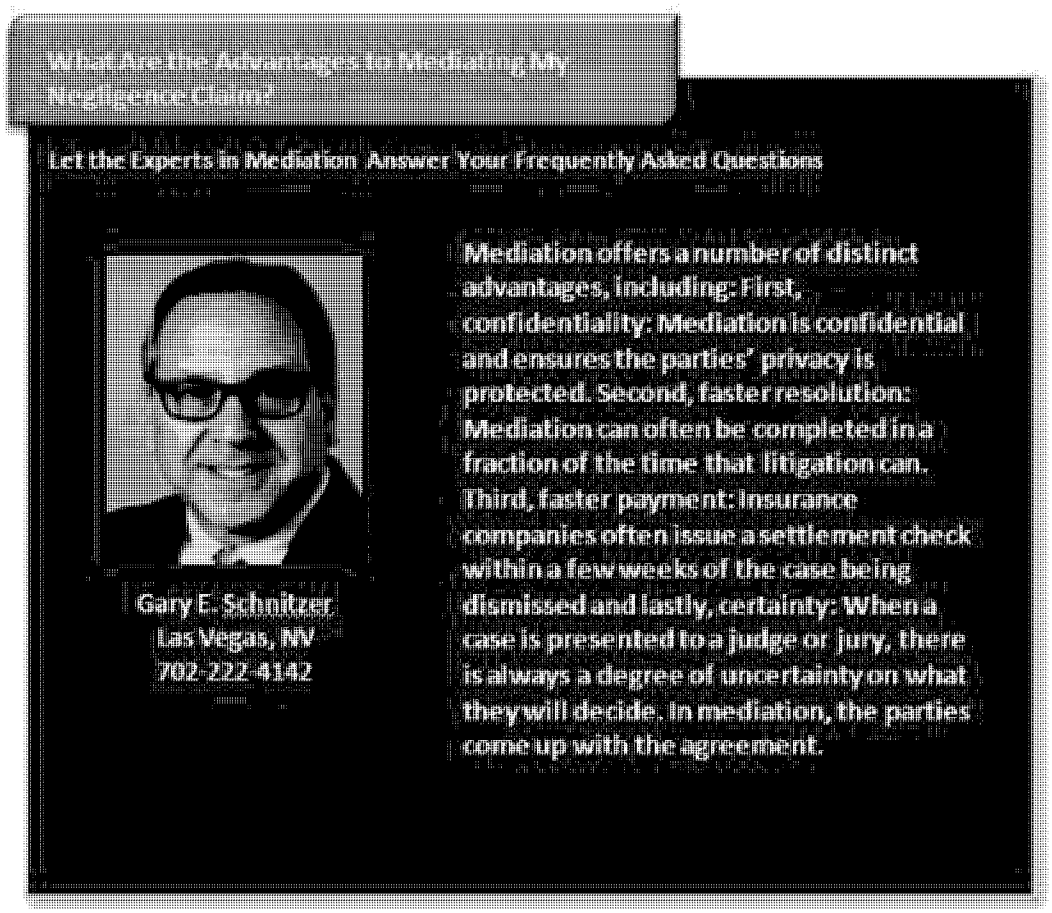
MEDIATOR OF THE MONTH: Gary Schnitzer



Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

ADM File No. 2015-26

Proposed Addition of
New Rule 3.808 of the
Michigan Court Rules

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

On order of the Court, this is to advise that the Court is considering an addition of Rule 3.808 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Rule 3.808 Finalizing Adoption; Findings of Court

Before entering a final order of adoption, the trial court shall determine that the adoptee is not the subject of any pending proceedings on rehearing or reconsideration, or on appeal from a decision to terminate parental rights. The trial court shall make the following findings on the record:

> That any appeal of the decision to terminate parental rights has reached disposition; that no appeal, application for leave to appeal, or motion for rehearing or reconsideration is pending; and that the time for all appellate proceedings in this matter has expired.

Staff Comment: The proposed addition of Rule 3.808 is consistent with § 56 of the Michigan Adoption Code, MCL 710.56. This new rule arises out of *In re JK*, 468 Mich 202 (2003), and *In re Jackson*, 498 Mich 943 (2015), which involved cases where a final order of adoption was entered despite pending appellate proceedings involving the adoptee children. Although the Michigan Court of Appeals has adopted a policy to suppress in its register of actions and online case search tool the names of children (and parents) who are the subject of appeals from proceedings involving the termination of

parental rights, this information remains open to the public. Therefore, in order to make the determination required of this new rule, a trial court may contact the clerk of the Michigan Court of Appeals, the Michigan Supreme Court, or any other court where proceedings may be pending.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2015-26. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017

Clerk

Public Policy Position
ADM 2015-26

The Access to Justice Policy Committee Supports ADM 2015-26

Explanation
The Court proposes adding a new rule, MCR 3.808, which would require a court to determine that the adoptee is not subject to any pending proceedings on rehearing or reconsideration, or on appeal from a decision to terminate parental rights prior to entering a final order of adoption. The proposed addition of MCR 3.808 is consistent with Section 56 of the Michigan Adoption Code, MCL 710.56, and the Michigan Supreme Court's rulings in *In re JK*, 468 Mich 202 (2003) and *In re Jackson*, 498 Mich 943 (2015). Both of these cases involved a final order of adoption that was entered even though there were pending appellate proceedings involving the adoptee children.

The committee believes that the proposed addition of MCR 3.808 serves the interests of all parties to such proceedings and is an effort to correct a clearly identified gap in the existing process; therefore, the Committee supports ADM 2015-26.

Number who voted in favor and opposed to the position:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

ADM File No. 2016-13

Proposed Addition of Rule 3.810
of the Michigan Court Rules

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

On order of the Court, this is to advise that the Court is considering adoption of a new Rule 3.810 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

Rule 3.810 Transcripts for Purposes of Appeal. In an appeal following the involuntary termination of the parental rights of a putative father, if the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.

Staff comment: The proposed new rule would require a court to provide an indigent putative father whose rights are terminated under the Adoption Code with transcripts for the purposes of appeal, similar to the requirement in MCR 3.977(J) for putative fathers whose rights are terminated under the Juvenile Code.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or

ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-13. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017

Clerk

Public Policy Position
ADM 2016-13

The Access to Justice Policy Committee Supports ADM 2016-13

Explanation
ADM 2016-13 creates new MCR 3.810, which would require the court to prepare transcripts at the public's expense for indigent putative fathers for appeals of involuntary termination of parental rights orders. The committee notes that the rule language is similar to the language set forth in the juvenile code. The committee supports the new rule proposal, as it increase access to justice for indigent putative fathers who would otherwise be unable to pay for transcripts to appeal an order terminating their parental rights.

Number who voted in favor and opposed to the position:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Public Policy Position
ADM File No. 2016-13

The Appellate Practice Section Supports ADM File No. 2016-13 with an Amendment.

Explanation
The proposed new rule would require a court to provide an indigent putative father whose rights are terminated under the Adoption Code with transcripts for the purposes of appeal, similar to the requirement in MCR 3.977(J) for putative fathers whose rights are terminated under the Juvenile Code.

Our concern is that the putative father may not be the only party who needs to appeal (or who is indigent and cannot afford transcripts for the appeal) in the context of an adoption code case. In addition to the putative father, a biological mother (or father) could release their parental rights to make way for an adoption, and then could decide (within a short time period) to revoke the release. It is still an adoption code case, but it might not just be a putative father who wants to appeal. In addition, a child (through the court appointed LGAL) may also want to appeal a decision under the adoption code.

We propose that the court rule not limit the transcripts for an indigent party to a putative father, but to any party to the adoption case who is indigent (in almost all cases, that would exclude the prospective adoptive parents). But it seems inequitable to only allow a putative father to obtain a free transcript, when there could be other contexts under the adoption code where another party (the mother, the child, and so on) have a need to appeal, and are also indigent.

We would suggest the following modification:

> 3.810 Transcripts for Purposes of Appeal. In an appeal following the termination of the parental rights of a putative father **or the refusal to allow a biological mother or father to revoke consent to release,** if the court finds that the **appealing party** is financially unable to pay for the preparation of transcripts for appeal, the court must order transcripts prepared at public expense.

Number who voted in favor and opposed to the position:
Voted For position: 22
Voted against position: 0
Abstained from vote: 0
Did note vote: 1

Contact Person: Joanne Geha Swanson
Email: jswanson@kerr-russell.com

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

ADM File No. 2017-18

Proposed Amendment of
Rule 3.903 of the Michigan
Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rules 3.903 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 3.903 Definitions

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)-(2) [Unchanged.]

(3) "Confidential file" means

(a) [Unchanged.]

(b) the contents of a social file maintained by the court, including materials such as:

(i)-(vi) [Unchanged.]

(vii) information regarding the identity or location of a foster parent, preadoptive parent, or relative caregiver~~, or juvenile guardian~~.

(4)-(27) [Unchanged.]

(B)–(F) [Unchanged.]

Staff Comment: The proposed amendment of MCR 3.903 would make juvenile guardianship information public. This change would resolve the conflict between the child protective proceeding social file (which is considered nonpublic) and the juvenile guardianship file (which is public) and would make the rule consistent with current court practices.

The staff comment is not an authoritative construction by the Court. In addition, adoption of a new rule or amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Office of Administrative Counsel in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-18. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017

Clerk

Public Policy Position
ADM 2017-18

The Access to Justice Policy Committee Supports ADM 2017-18

Explanation
The committee supports ADM 2017-18 for the reasons set forth in the staff comment to the rule proposal.

Number who voted in favor and opposed to the position:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

From: Patricia Hansen
To: ADMcomment
Subject: 2017.18
Date: Wednesday, October 18, 2017 11:06:43 AM

As Family Court Administrator I agree that the deletion of juvenile guardianships under MCR 3.903 is appropriate as the identity of the juvenile guardian is known to the parties.

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

ADM File No. 2017-08

Proposed Amendments of
Rules 3.977 and 6.425
of the Michigan Court Rules

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.977 and Rule 6.425 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 3.977 Termination of Parental Rights.

(A)-(I) [Unchanged.]

(J) Respondent's Rights Following Termination.

(1) Advice. Immediately after entry of an order terminating parental rights, the court shall advise the respondent parent orally or in writing that:

(a) The respondent is entitled to appellate review of the order.

(b) If the respondent is financially unable to provide an attorney to perfect an appeal, the court will appoint an attorney and furnish the attorney with the ~~portions of the~~ complete transcript and record of all proceedings ~~the attorney requires to appeal~~.

(c)-(d) [Unchanged.]

(2) [Unchanged.]

(3) Transcripts. If the court finds that the respondent is financially unable to pay for the preparation of transcripts for appeal, the court must order the complete transcripts of all proceedings prepared at public expense.

(K) [Unchanged.]

Rule 6.425 Sentencing; Appointment of Appellate Counsel.

(A)-(F) [Unchanged.]

(G) Appointment of Lawyer; Trial Court Responsibilities in Connection with Appeal.

(1) [Unchanged.]

(2) Order to Prepare Transcript. The appointment order also must

(a) direct the court reporter to prepare and file, within the time limits specified in MCR 7.210, the complete transcript of all proceedings, and

~~(i) the trial or plea proceeding transcript,~~

~~(ii) the sentencing transcript, and~~

~~(iii) such transcripts of other proceedings, not previously transcribed, that the court directs or the parties request, and~~

(b) provide for the payment of the reporter's fees.

The court must promptly serve a copy of the order on the prosecutor, the defendant, the appointed lawyer, the court reporter, and the Michigan Appellate Assigned Counsel System. If the appointed lawyer timely requests additional transcripts that were not in the initial order, the trial court shall order such transcripts within 14 days after receiving the request.

(3) [Unchanged.]

Staff Comment: The proposed amendments of MCR 3.977(J) and MCR 6.425(G) were submitted by the Court of Appeals. The proposed amendments would require the production of the complete transcript in criminal appeals and appeals from termination of parental rights proceedings when counsel is appointed by the court. The proposed amendments would codify existing practice in many courts, and the Court of Appeals believes they would promote proper consideration of appeal issues and eliminate unnecessary delays to the appellate process.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2017-08. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017

Clerk

Public Policy Position
ADM 2017-08

The Access to Justice Policy Committee Supports ADM 2017-08

Explanation
ADM 2017-08 would require the court to furnish an attorney of an indigent client with complete transcripts for criminal appeals or termination of parental rights appeals. The committee agrees with the reasons for the rule amendment set forth by the Michigan Court of Appeals in the staff comment. The rule amendment will promote access to justice for indigent appellants and enable attorneys representing these clients to better identify issues for appeal. In addition, the rule amendment will save time in the appellate process, as parties will not have to request additional transcripts.

Number who voted in favor and opposed to the position:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Public Policy Position
ADM File No. 2017-08

The Criminal Jurisprudence & Practice Committee Supports ADM File No. 2017-08.

Number who voted in favor and opposed to the position:
Voted For position: 11
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

Public Policy Position
ADM File No. 2017-08

The Appellate Practice Section Supports ADM File No. 2017-08.

Explanation

The Appellate Practice Section supports the proposed amendments to MCR 3.977(J) and MCR 6.425(G) to require trial courts to provide all lower court transcripts in appointed child welfare and criminal appeals. The proposed amendments would ensure that appointed appellate counsel have the benefit of all necessary transcripts at the outset of the appeal, permitting a prompt and complete review of lower court proceedings and eliminating significant wasted time and effort in the appellate process.

The existing version of MCR 3.977(J), applicable to child welfare appeals, requires only that the trial court "furnish the attorney with the portions of the transcript and record the attorney requires to appeal." Among its problems, this language fails to clarify that it is the responsibility of counsel—as opposed to the trial court itself—to decide which transcripts are truly necessary for the appeal. Moreover, just as the trial court faces a financial disincentive to find all transcripts necessary, an appointed attorney faces a disincentive to request them, as doing so may risk the loss of future appointments from the trial court. As a result, far too many appointed child welfare appeals proceed in the absence of a complete lower court record.

The existing version of MCR 6.425(G), applicable in criminal appeals, is less problematic because it requires trial courts to provide any transcript that "the parties request," and appointed counsel enjoy independence from trial court appointment decisions in felony appeals. But the process for requesting and ordering additional transcripts is cumbersome, time consuming, and inefficient, requiring the preparation of amended appointment orders and adding weeks or months to the life of the appeal.

In substance, this proposed amendment to MCR 6.425(G) closely resembles the transcript provision found in a separate proposal under ADM File No. 2014-36 (which the Appellate Practice Section also supports), except that this proposal retains language that "[i]f the appointed lawyer timely requests additional transcripts that were not in the initial order, the trial court shall order such transcripts within 14 days after receiving the request." The proposal under ADM File No. 2014-36 omits this provision, perhaps because of the paucity of cases in which it would apply. The Appellate Practice Section has no objection to this 14-day provision and takes no position on whether it remains necessary, but suggests that the Court should reconcile the substance of the two pending proposals to amend MCR 6.425(G) before adopting either.

Number who voted in favor and opposed to the position:

Voted For position: 17
Voted against position: 0
Abstained from vote: 0
Did note vote: 5

Contact Person: Joanne Geha Swanson **Email:** jswanson@kerr-russell.com

Public Policy Position
ADM File No. 2017-08

The Criminal Law Section Supports ADM File No. 2017-08.

Explanation:
The Section supports ADM 2017-18 for the reasons set forth in the staff comment to the rule proposal.

> The proposed amendments to MCR 3.977(J) and MCR 6.425(G) were submitted by the Court of Appeals. The proposed amendments would require the production of the complete transcript in criminal appeals and appeals from termination of parental rights proceedings when counsel is appointed by the court. The proposed amendments would codify existing practice in many courts, and the Court of Appeals believes they would promote proper consideration of appeal issues and eliminate unnecessary delay to the appellate process.

Number who voted in favor and opposed to the position:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Michael Marutiak

Email: marutiakm@michigan.gov

Order

Michigan Supreme Court
Lansing, Michigan

October 17, 2017

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Joan L. Larsen
Kurtis T. Wilder,
Justices

ADM File No. 2016-25

Proposed Amendment of
Rule 7.212 of the
Michigan Court Rules

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.212 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at Administrative Matters & Court Rules page.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining
and deleted text is shown by strikeover.]

Rule 7.212 Briefs.

(A)-(B) [Unchanged.]

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

(1)-(7) [Unchanged.]

(8) The relief, stating in a distinct, concluding section the order or judgment requested; ~~and~~

(9) A signature.~~;~~ and

(10) Only as provided in section (J) of this rule, an appendix.

(D)-(I) [Unchanged.]

(J) Appendix.

(1) The purpose of an appendix is to permit the parties to prepare and transmit to the court copies of those portions of the record deemed necessary to an understanding of the issues presented.

(2) In all civil cases (except those pertaining to child protection proceedings, including termination of parental rights, and non-criminal delinquency proceedings under chapter XIIA of the Probate Code and adoptions under chapter X), and in all appeals from administrative agencies, except those described in section (J)(6) of this rule, the appellant shall file and serve an appendix no later than 14 days after the date the principal brief is filed. The appellant's appendix shall contain a table of contents and copies of the following documents if they exist:

(a) The judgment or order(s) appealed from, including any written opinion, memorandum, findings of fact and conclusions of law stated on the record, in conjunction with the judgment or order(s) appealed from;

(b) A copy of the trial court docket sheet;

(c) The relevant pages of any transcripts cited in support of the appellant's position on appeal. Where appropriate, the appellant may attach pages preceding and succeeding the page cited if helpful to provide context to the citation. If a complete trial, deposition, or administrative transcript is filed, the index to such transcript must be included;

(d) If a jury instruction is challenged, a copy of the instruction, any portion of the transcript containing a discussion of the instruction, and any relevant request for the instruction; and

(e) Any other exhibit, pleading, or other evidence that was submitted to the trial court and that is relevant and necessary for the Court to consider in deciding the appeal. Briefs submitted in the trial court are not required to be included in the appendix unless they pertain to a contested preservation issue.

For material that is subject to an existing protective order, or for evidence that is not subject to such an order, but which contains information that is confidential or privileged, the procedures of MCR 7.211(C)(9) apply.

(3) The appellee shall file and serve an appendix with its responsive brief only if the appellant's appendix does not contain all the information set forth in section (J)(2) of this rule. The appellee's appendix shall not contain any of the documents contained in the appellant's appendix, but shall only contain additional information described in section (J)(2) that is relevant and necessary to the determination of the issues raised in the appeal.

(4) Each volume of any appendix shall contain no more than 250 pages. The table of contents shall identify each document with reasonable definiteness, and indicate the volume and page of the appendix where the document is located. The cover to the appendix shall indicate in bold type whether it is the "Appellant's Appendix" or "Appellee's Appendix."

(a) For a paper appendix, each document shall also be tabbed. A paper appendix shall be bound separate from the brief.

(b) If an appendix is to be filed electronically, it must be filed as an independent .pdf file or a series of independent .pdf files. The table of contents for electronically filed appendixes shall contain bookmarks, linking to each document in the appendix.

(5) In cases involving more than one appellant or appellee, including cases consolidated for appeal, to avoid duplication each side shall, where practicable, file a joint rather than separate appendixes.

(6) This subsection does not apply to appeals arising from the Michigan Public Service Commission in which the record is available on the Commission's e-docket. In those cases, the parties shall cite to the document number and relevant pages.

(7) Failure to comply with any part of this rule may result in monetary sanctions against the attorney that failed to comply.

Staff Comment: The proposed amendment of MCR 7.212 was submitted by the Court of Appeals. Proposed amendments of MCR 7.212 would require an appellant to file an appendix with specific documents within 14 days after filing the appellant's principal brief. The proposal is intended to identify for practitioners the key portions of the record that the Court deems necessary for thorough and efficient review of the issues on appeal.

The staff comment is not an authoritative construction by the Court. In addition, adoption of an amendment in no way reflects a substantive determination by this Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2018, at P.O. Box 30052, Lansing, MI 48909, or ADMcomment@courts.mi.gov. When filing a comment, please refer to ADM File No. 2016-25. Your comments and the comments of others will be posted under the chapter affected by this proposal at Proposed & Recently Adopted Orders on Admin Matters page.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 17, 2017

Clerk

Public Policy Position
ADM 2016-25

The Access to Justice Policy Committee Supports ADM 2016-25

Explanation
The proposed amendment of MCR 7.212 was submitted by the Michigan Court of Appeals and would require an appellant to file and serve an appendix within 14 days after a brief is filed. The proposed amendments also set out the format and contents of the appendix.

The Access to Justice Policy Committee voted unanimously to support the amendments. Most appellate practitioners already submit appendices in a similar format. The proposed amendments essentially codify the practice and ensure uniformity.

Number who voted in favor and opposed to the position:
Voted For position: 20
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Public Policy Position
ADM File No. 2016-25

The Civil Procedure & Courts Committee Supports ADM File No. 2016-25 with Amendments.

Explanation
The committee supports the rule proposal requiring appendices to be filed in appellate proceedings; however, the committee recommends the following amendments to the rule.

First, the committee would like the rule to clarify whether the appendix requirements eliminate the need for parties to file exhibits with their appellate briefs.

Second, the committee recommends requiring parties to file their appendices with their appellate briefs, rather than giving them an additional 14 days to file the appendix. Since parties will have to cite the appendix in their appellate briefs, the parties will need the appendix completed by the time they file their brief, so the committee did not see a reason to allow parties an additional 14 days to file appendices.

Third, the committee recommends that the rules make clear that cross-appellants and cross-appellees have the same duties to file appendices.

Number who voted in favor and opposed to the position:
Voted For position: 17
Voted against position: 0
Abstained from vote: 1
Did note vote: 8

Contact Person: Karen H. Safran
Email: ksafran@carsonfischer.com

Public Policy Position
ADM File No. 2016-25

The Criminal Jurisprudence & Practice Committee Supports ADM File No. 2016-25.

Number who voted in favor and opposed to the position:
Voted For position: 11
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

SBM | APPELLATE PRACTICE SECTION

Public Policy Position
ADM File No. 2016-25

The Appellate Practice Section Supports ADM File No. 2016-13 with Amendments

Explanation
The APS Council understands the Court's interest in an appendix containing specific portions of the record and how it would assist the Court in deciding the issues on appeal. But the Council is concerned that the proposed rule may be unwieldy in certain respects. The Council therefore suggests the following revisions, accompanied by a few margin comments:

Rule 7.212 Briefs.

(A)-(B) [Unchanged.]

(C) Appellant's Brief; Contents. The appellant's brief must contain, in the following order:

(1)-(7) [Unchanged.]

(8) The relief, stating in a distinct, concluding section the order or judgment requested; and ~~and~~

~~(9) A signature.; and.~~

~~(10) Only as provided in section (J) of this rule, an appendix.~~

Commented [RJ1]: An appendix is not part of the "brief"; rather, it is a separate document, as suggested by its placement in a separate subrule. In addition, making the appendix part of the brief would result in potentially large appendices being taxed by a prevailing party at $1 per page, which seems excessive. The Council therefore suggests eliminating this proposed change.

(D)-(I) [Unchanged.]

(J) Appendix.

~~(1) The purpose of an appendix is to permit the parties to prepare and transmit to the court copies of those portions of the record deemed necessary to an understanding of the issues presented.~~

Commented [RJ2]: This is captured by the staff comment. The Council recommends that the rule avoid "intent" provisions that don't impose a specific procedural requirement.

(21) An appendix is required in all civil cases, except those listed in subsection (J)(9) of this rule. ~~In all civil cases (except those pertaining to child protection proceedings, including termination of parental rights, and non-criminal delinquency proceedings under chapter XIIA of the Probate Code and adoptions under chapter X), and in all appeals from administrative agencies, except those described in section (J)(6) of this rule, the appellant shall file and serve an appendix no later than 14 days after the date the principal brief is filed.~~

Commented [RJ3]: Exceptions moved to (J)(9). In addition, the Council suggests that for ease of citing to portions of the appendix as the brief is being prepared, the appendix should be filed at the same time as the appellant's principal brief. This also avoids the appellee having to wait an additional 14 days for the appellant's appendix to be filed.

(2) When an appendix is required, the parties may file a joint appendix with the appellant's brief on appeal, or each party (or each side, in consolidated cases or cases involving multiple appellants or appellees) may file individual appendixes with ~~their~~

its principal brief. If individual appendixes are filed, the appendix filed by the appellee(s) must not contain any of the documents contained in the appendix filed by the appellant(s), except as necessary to provide context. The appellant may file a supplemental appendix with its reply brief, regardless of whether the parties filed a joint appendix or individual appendixes with their principal briefs.

Commented [RJ4]: Combines proposed (J)(3) and (J)(5) and adds the possibility of joint appendixes.

(3) ~~The appellant's~~An appendix ~~shall~~ must contain a title page bearing the caption of the case and identifying the filing party, a table of contents identifying the beginning page number or tab of each document (and the volume in which the document is located if the appendix consists of multiple volumes), and ~~copies of~~ the following documents, if they exist:

(a) The judgment or order(s) appealed from, including any written opinion, memorandum, findings of fact and conclusions of law stated on the record, in conjunction with the judgment or order(s) appealed from;

(b) A copy of the trial court docket sheet;

(c) The relevant pages of any transcripts, including the preceding and succeeding pages if helpful to provide context, together with the caption and title page(s) and the index or table of contents appearing at the beginning of each such transcript~~cited in support of the appellant's position on appeal. Where appropriate, the appellant may attach pages preceding and succeeding the page cited if helpful to provide context to the citation. If a complete trial, deposition, or administrative transcript is filed, the index to such transcript must be included~~;

(d) If a jury instruction is challenged, a copy of the instruction, any portion of the transcript containing a discussion of the instruction, and any relevant request for the instruction; and

(e) Any other ~~exhibit, pleading, or other evidence that was submitted to the trial court and~~portion of the record that is relevant and necessary for the Court to consider in deciding the appeal. Briefs submitted in the trial court are not required to be included in the appendix unless they pertain to a contested preservation issue.

~~For material that is subject to an existing protective order, or for evidence that is not subject to such an order, but which contains information that is confidential or privileged, the procedures of MCR 7.211(C)(9) apply.~~

Commented [RJ5]: Moved to (J)(7).

~~(3) The appellee shall file and serve an appendix with its responsive brief only if the appellant's appendix does not contain all the information set forth in section (J)(2) of this rule. The appellee's appendix shall not contain any of the documents contained~~

~~in the appellant's appendix, but shall only contain additional information described in section (J)(2) that is relevant and necessary to the determination of the issues raised in the appeal.~~

(4) The documents in an appendix must be uniquely paginated, or each document in an appendix must be separated by an electronic cover page or, for a paper appendix, with physical numbered or lettered tabs.

(5) An electronic appendix must be filed as a separate, single-volume PDF with bookmarks to each document in the appendix.

(6) A paper appendix must be filed separately from the brief, bound in one or more volumes, with no volume containing more than 250 pages.~~Each volume of any appendix shall contain no more than 250 pages. The table of contents shall identify each document with reasonable definiteness, and indicate the volume and page of the appendix where the document is located. The cover to the appendix shall indicate in bold type whether it is the "Appellant's Appendix" or "Appellee's Appendix."~~

~~(a) For a paper appendix, each document shall also be tabbed. A paper appendix shall be bound separate from the brief.~~

~~(b) If an appendix is to be filed electronically, it must be filed as an independent .pdf file or a series of independent .pdf files. The table of contents for electronically filed appendixes shall contain bookmarks, linking to each document in the appendix.~~

(~~5~~7) If material must be included in an appendix that was filed with a lower court or administrative agency under seal or is subject to an existing protective order, the party whom must include the material must file it in a separately~~-bound~~ appendix with its own title page and table of contents. The procedures in MCR 7.211(C)(9) govern the filing and handling of this appendix.~~In cases involving more than one appellant or appellee, including cases consolidated for appeal, to avoid duplication each side shall, where practicable, file a joint rather than separate appendixes.~~

(~~6~~8) Notwithstanding this rule, the parties may cite portions of the record that are not included in an appendix.

(9) This subsection does not apply to appeals pertaining to:

(a) child-protection proceedings, including termination of parental rights;

(b) non-criminal juvenile delinquency proceedings;

(c) adoptions; or

Commented [RJ6]: The Council believes that separate pagination of an appendix should be optional, as it can be cumbersome and time-consuming.

Commented [RJ7]: This would require eliminating the current 25MB limit on uploads to TrueFiling, but would make electronic appendixes more user-friendly. Paper appendixes would still be limited to 250 pages per volume.

(d) cases that originated before ~~arising from~~ the Michigan Public Service Commission in which the record is available on the Commission's e-docket. In those cases, the parties shall cite to the document number and relevant pages from the e-docket. Citations to the record in MPSC cases should contain an identification of the document and page number referenced, along with a reference to the edocket document number (DN) and the .pdf page number if that number differs from the document's internal pagination. Ex. Answer to Application, p 24; DN 35. Hr'g Tr Vol 8, p 2834; DN 107 at 328.

~~(7) Failure to comply with any part of this rule may result in monetary sanctions against the attorney that failed to comply.~~

Commented [RJ8]: The Council believes that this sanction is overly harsh, and that it would be more appropriate for the Court to use its standard 21-day defect correction procedure.

Number who voted in favor and opposed to the position:
Voted For position: 21
Voted against position: 0
Abstained from vote: 0
Did note vote: 0

Contact Person: Joanne Geha Swanson
Email: jswanson@kerr-russell.com

From:	Matt Klakulak
To:	ADMcomment
Subject:	ADM File No. 2016-25--Comments on Proposed Additional Subrule MCR 7.212(J)
Date:	Wednesday, October 18, 2017 11:38:23 AM

Mr. Royster:

I am writing to provide my comments on proposed additional subrule MCR 7.212(J). Requiring a separate appendix to be filed with every application for leave to appeal (see MCR 7.205(B)(1) and (C)(1)) and every brief on appeal with all sorts content and formatting requirements would be both tedious and unnecessary. Most appellate practitioners I deal with already submit the portions of the record they deem most pertinent to their arguments on appeal as exhibits to their applications and briefing and the court rules need only be amended to specifically direct that this be done (and to perhaps provide certain guidelines for that practice). Requiring an separate appendix with the requirements set forth in proposed MCR 7.212(J) goes to far and should not be adopted by the Court.

Respectfully,

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Economic Disincentives or Incentives

Comments on this proposed standard are invited through February 1, 2018.

Attorneys must have the time, fees, and resources to provide the effective assistance of counsel guaranteed to indigent criminal defendants by the United States and Michigan Constitutions. The MIDC Act calls for a minimum standard that provides: "Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided." MCL 780.991(2)(b). Fair compensation for assigned counsel may optimally be achieved through a public defender office, and the MIDC recommends an indigent criminal defender office be established where assignment levels demonstrate need, together with the active participation of a robust private bar. MCL 780.991(1)(b). In the absence of, or in combination with a public defender office, counsel should be assigned through a rotating list and be reasonably compensated. Contracted services for defense representation are allowed, so long as financial disincentives to effective representation are minimized. This standard attempts to balance the rights of the defendant, defense attorneys, and funding units, recognizing the problems inherent in a system of compensation lacking market controls.

The MIDC proposes the following minimum standard regarding economic incentives and disincentives:

A. Rates of Payment for Salaried Public Defenders. Reasonable salaries and benefits and resources should be provided to indigent defense counsel. The rates paid by the Michigan Attorney General for Special Assistant Attorneys General, or other state offices serve as guidance for reasonable compensation.

B. Compensation and Expenses for Assigned Counsel. Assigned counsel should receive prompt compensation at a reasonable rate and should be reimbursed for their reasonable out-of-pocket, case-related expenses. Assigned counsel should be compensated for all work necessary to provide quality legal representation. Activities outside of court appearances, such as directing an investigation, negotiating, or tactical planning, etc., require no less legal skill and expertise than in-court appearances, and are equally important to quality representation.

Attorney hourly rates shall be at least $100 per hour for misdemeanors, $110 per hour for non-life offense felonies, and $120 per hour for life offense felonies. These rates must be adjusted annually for cost of living increases consistent with economic adjustments made to State of Michigan employees' salaries. Counsel must also be reimbursed for case-related expenses as specified in Section E.

To protect funding units, courts and attorneys alike, local systems should establish expected hourly thresholds for additional scrutiny. Assigned counsel should scrupulously track all hours spent preparing a case to include with invoice submission. All receipts or documentation for out-of-pocket and travel-related expenses actually incurred in the case qualifying for reimbursement should be preserved. Fee requests which exceed expected hourly thresholds should not be paid until an administrative review indicates that the charges were reasonably necessary.

Event based, capped hourly rates, and flat fee payment schemes are discouraged unless carefully designed to minimize disincentives and provide compensation reasonably expected to yield an hourly rate of compensation equivalent to the required minimum rate. If utilized, these alternative schemes must be based on a compensation system that realistically assesses the cost of providing competent representation, including the costs of trial, investigation, expert assistance, and extraordinary expenses, and should take into consideration objective standards of representation consistent with those set forth in other minimum standards for indigent defense. They should also follow all expense reimbursement guidelines in Section E.

C. Contracting for Indigent Defense Services. The terms of any indigent defense contract should avoid any actual or apparent financial disincentives to the attorney's obligation to provide clients with competent legal services. Contracts may only be utilized if:

(1) They are based on reliable caseload data, and in conjunction with a method, specified in the contract, for compensation to account for increases or decreases in caseload size;

(2) They are based on a compensation system that realistically assesses the cost of providing competent representation as described above in Section B;

(3) They provide for regular, periodic payments to the indigent defense organization or attorney;

(4) They include a mechanism to seek reimbursement for case-related expenses;

(5) They include a provision allowing for counsel to petition for additional compensation for the assignment of co-counsel in any case where the offense charged or enhancement sought subjects the indigent defendant to life in prison;

(6) They implement the MIDC required hourly rates; when hourly schemes are not utilized, local systems must demonstrate that compensation is at least equivalent to these rates.

D. Conflict Counsel. When any conflict of interest is identified by a public defender office or by assigned counsel, that case should be returned for reassignment to the designating authority. Payments to conflict counsel (fees or any other expenses incurred during the representation) shall not be deducted from the line item or contract negotiated with the primary providers (public defender office, house counsel, assignment system or through any agreement with private attorneys or law firms).

E. Reimbursements. Attorneys must be reimbursed for any out-of-pocket expenses they incur as a result of representation. Mileage should be reimbursed based on prevailing local norms and should not be less than State of Michigan standard published rates.

F. Payments. Vouchers submitted by assigned counsel and contract defenders should be reviewed by an administrator and/or her and his staff, who should be empowered to approve or disapprove fees. This is efficient, ensures the independence of counsel, and relieves judges of the burden of this administrative task. It also helps to equalize fees through a centralized fee-approval system. Vouchers should be approved in a timely manner unless there is cause to

believe the amount claimed is unwarranted. In lengthy cases, periodic billing and payment during the course of representation should be allowed.

Expenditure of public dollars should be subject to control mechanisms and audits that verify expenditure accuracy. This should be accomplished by following generally accepted procedures that separate staff duties; establish billing policies; and ensure thorough review of vouchers, including benchmark setting and investigation where necessary. The approval process should be supported by an efficient dispute resolution procedure.

Sources and Authority:

A Race to the Bottom: Speed & Savings Over Due Process: A Constitutional Crisis, National Legal Aid & Defender Association (2008).

U.S.C.A. Const. Amend. 6; Mich. Const. 1963 Art. 1, § 20.

ABA 10 Principles of a Public Defense Delivery System (Principle 8).

American Bar Association Criminal Justice Standards for Providing Defense Services, Standard 5-2.4.

Position Paper on Reasonable Fees After the Passage of the MIDC Act, Michigan Indigent Defense Commission (Summer 2016).

In re Atchison, No. 292281, 2012 WL 164437 (Mich. Ct. App. Jan. 19, 2012).

Comments

1. *Attorneys should be reimbursed for expenses for investigators, expert witnesses, transcripts, and any out-of-pocket expenses incurred in the course of representation.*
2. *For hourly payments, local systems should establish protocol through which indigent defense administrators oversee the submission, review and approval of invoices for both assigned counsel and contract counsel. Attorneys should be directed to submit explanations for any invoices in which their hours exceed the expected maximum hours. After attorneys submit itemized bills, the administrator and/or staff should review and determine whether the case falls into the category of minimal scrutiny, meaning that it falls within the expected number of allotted hours, or the category of heightened scrutiny for exceeding an expected hourly threshold, meaning the administrator needs to further investigate the invoice. Bills should not be automatically approved or denied if they fall too far above or below the expected threshold, but rather the attorneys' explanations should be reviewed, and if the administrator does not find the explanation sufficient, the administrator should invite further explanation. Upon receiving additional details, the administrator then makes a final decision. All local systems should have policies in place that outline voucher review procedures, including the right for attorneys to appeal decisions and the right for administrators to remove attorneys from panel lists or terminate contracts for ongoing submissions that exceed the threshold.*

3. *Due to the potential to disincentivize quality representation, event based, capped hourly rates, and flat fee payment schemes will be subjected to increased monitoring and auditing as a condition of receiving MIDC funds.*
4. *The MIDC will collect data on event based, capped hourly rates, and flat fee payment schemes for the first year after implementation of this standard and revise the standard if these schemes are disincentivizing quality representation.*

Public Policy Position
MIDC Standard 8

The Access to Justice Policy Committee Supports with the Michigan Indigent Defense Commission Standard 8.

Explanation

The Access to Justice Policy Committee supports MIDC Standard 8, which attempts to promote proper funding for court-appointed counsel for indigent criminal defendants and to eliminate economic disincentives or incentives that impair effective representation. The Standard attempts to do so through a number of means including:

a. Encouraging well-funded public defender offices with salaries comparable to those of Special Assistant Attorney Generals or other state attorneys.

b. Providing reasonable fees (suggested at $100 - $120 depending on the complexity of the case) for both in court and out of court work. And discouraging event based fee systems (those systems that pay only for in court events such as a guilty plea or motion hearing).

c. Providing that contracts for public defense services are reasonable and allow for additional funding requests when caseloads are unusually high.

d. Providing for conflict counsel to replace public defenders and contract counsel without a reduction in the budget of public defender offices or contract counsel.

e. Providing reimbursement for actual expenses.

f. Providing for a review of hourly vouchers by an administrative office to avoid conflicts with judges.

Michigan ranks near the bottom of the country in per capita spending on indigent defense services. A 2008 National Legal Aid and Defender Association report found it ranked 44, spending $7.35 per person, while the national average was $11.86. *A Race to the Bottom, Speed and Savings Over Due Process: A Constitutional Crisis*, National Legal Aid and Defender Ass'n (June 2008). Poor indigent defense services can lead to both wrongful convictions and unnecessarily long sentences.

Although Standard 8 calls for relatively large increases in fees over what many courts are currently paying, a large increase is necessary to provide adequate representation. The hourly fees are still approximately half of what the average solo practitioner in Michigan charges on an hourly basis and approximately half of what attorneys charge for private criminal defense representation. See the State Bar of Michigan 2014 Economics of Law Practice Survey, Table 3 – Attorney Hourly Billing Rates and Table 7 – Attorney Hourly Billing Rates by Field of Practice.

In response to a committee member's query, MIDC explained that it proposed these rates with the goal of paying a reasonable hourly rate plus a reasonable overhead allowance. The MIDC took an average overhead rate of $55 per hour based on attorney surveys and adjusted it upwards by $10 per hour because they believed the number was artificially low based on attorneys who operate out of

their home and forgo training opportunities to keep overhead lower. They then added to that number the approximate hourly salaries of state agency attorneys ($35 to $55 dollars per hour) depending on the complexity of the case in order to make the hourly rate of persons accepting indigent criminal defense appointments approximately equal to state employees of relatively similar experience.

Outside of the hourly rate, the second most controversial aspect of the Standard is the discouragement of event based fee systems. These systems discourage good lawyering through two economic disincentives. First, low fees for trials and motion practice often encourage attorneys to attempt to plead out a high number of cases with relatively little work to make the practice of law economically viable. This results in a lower standard of practice for indigent clients compared to those with retained lawyers. Second, by paying per event, rather than the actual hours worked, attorneys often have no incentive to put the often long and laborious work into the case of a difficult client who should be convinced to plead guilty. The attorney may decide that the he or she cannot afford the long uncompensated hours necessary to get the client to plead and it is easier and more advantageous to simply take the case to trial. In the end, these unnecessary trials cost the state more money in wasted judicial and prosecutorial resources and longer sentences.

Standard 8 will result in more reasonable pay for attorneys representing indigent criminal defendants and thereby improve indigent criminal defendants' access to legal services and the quality of those services. For these reasons, the committee unanimously supports Standard 8.

Number who voted in favor and opposed to the position:
Voted For position: 19
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

***Keller* Explanation**
MIDC Standard 8 is *Keller* permissible because it impacts criminal defendants' access to legal services and the quality of those services.

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Public Policy Position
Michigan Indigent Defense Commission Standard 8

The Criminal Jurisprudence & Practice Committee Supports Michigan Indigent Defense Commission Standard 8 as Written.

Explanation
The committee agreed that "attorneys must have time, fees, and resources" to provide effective counsel to appointed cases. Several members of the committee have experience in accepting court appointed cases and agreed that fair compensation and provision for experts is necessary to providing a sound defense for clients. With limited pay, there might be a negative incentive to not go to trial or not request an expert. With improved compensation, more attorneys may sign up to take these cases.

Number who voted in favor and opposed to the position:
Voted For position: 11
Voted against position: 0
Abstained from vote: 0
Did note vote: 6

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

Public Policy Position
MIDC Standards 5 – 8

The Criminal Law Section Supports MIDC Standards 5 – 8.

Explanation
The Council took a position in support of goals of the Michigan Indigent Defense Commission (MIDC). After discussion and some revision of a proposed position, the Council voted for the following: "The Criminal Law Section supports the goals of [sic] MIDC proposed standards 5-8 of increasing the independence, competency, and overall quality of indigent defense services in Michigan. The CLS also supports removing excessive workloads and inadequate compensation that may interfere with a criminal defendant's constitutional right to counsel. The CLS recognizes the financial concerns of certain counties of complying with these proposed standards, and therefore, supports the State fulfilling its statutory obligation of funding compliance costs that exceed the local share."

Number who voted in favor and opposed to the position:
Voted For position: 15
Voted against position: 2
Abstained from vote: 1
Did note vote: 9

Contact Person: Michael Marutiak

Email: marutiakm@michigan.gov

Marla McCowan

From: Erin Freers-Cole <efreers@comcast.net>
Sent: Friday, December 01, 2017 9:28 AM
To: Comments
Subject: Economic Incentives and Disincentives Comments

Dear Indigent Defense Commission:

I am very concerned with the provisions relating to reimbursement of out of pocket expenses. While I appreciate the order that there be reimbursement (as this is not always the case) I find it very troubling that I am required to advance anything out of pocket at all.

As it is currently, I pay for videos, pictures, 911 calls, etc anything that the prosecutor does not have immediately in their possession. I have to then FOIA the information (that I believe should be part of discovery) from the police department and pay any costs associated with my request. I am usually reimbursed some 3-6 months later when the case resolves but honestly sometimes I forget to submit the bill. I find the reimbursement for experts very troubling as I am not sure that I would be able to front the cost for what would be needed since as things are now most experts make more on a case that I do.

I also think there should be more of a difference in hourly rates, $10 more an hour for a capital case?? I would set the rates more at $100 for misdemeanors $150 for non life felonies and $200 for life offenses. It is often said that if you want good people you have to pay them, I don't think attorneys are any different. I also think that those who do defend capital cases have for a very long time done it out of a sense of obligation and respect for the system and they finally deserve to be compensated.

Thank you for your time and consideration. Please feel free to contact me if you have any questions or concerns.

Very Truly Yours,

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FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee solicits comment on the following proposal by February 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes new instructions, M Crim JI 10.9, 10.9a, 10.9b, 10.9c and 10.9d, for the organized retail crime statutes found at MCL 752.1083 and 752.1084.

[NEW] M Crim JI 10.9 Organized Retail Crime – Merchandise Theft

(1) The defendant is charged with committing an organized retail crime involving the theft of retail merchandise. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

[*Select (2), (3), or (4) according to what has been charged:*]

(2) First, that the defendant took some property from a person or a business that sells merchandise at retail without the consent of the person or business.

(3) First, that the defendant organized, supervised, financed, or otherwise managed or assisted another[1] in taking some property from a person or a business that sells merchandise at retail.

(4) First, that the defendant conspired with another person or persons[2] to take some property from a person or a business that sells merchandise at retail.

(5) Second, that the property [taken / to be taken] was retail merchandise, which is a new article, product, commodity, item, or component that was intended for sale in retail commerce.

(6) Third, that the defendant intended to [permanently deprive the owner of the retail merchandise that was taken or intended to be taken / cheat the owner out of the value of the retail merchandise that was taken[3]].

(7) Fourth, that when the retail merchandise was taken, the defendant intended that the merchandise would be resold or distributed, or would otherwise be reentered in commerce. Reentering the merchandise in commerce includes transferring it to another person or another business that sells merchandise at retail. A transfer may be done personally, by mail, or through any electronic medium, including the Internet, but it must be intended to be done in exchange for something of value. It does not matter whether the reentry or transfer of the merchandise actually took place, so long as the defendant intended that it take place at the time that it was taken.

Use Note

1. In cases where the defendant is alleged to have aided or assisted another person and the defendant is not the person who is alleged to have committed the act, the aiding and abetting instructions (see Chapter 8) should be given.
2. The conspiracy instructions in M Crim JI 10.1, 10.2, 10.3, and 10.4 should be given when the theory is that the defendant conspired with another to commit an organized retail crime.

3. Use the second option only when the defendant returns the stolen merchandise to the original owner for a fraudulent refund.

[NEW] M Crim JI 10.9a Organized Retail Crime – Possession of Stolen Merchandise

(1) The defendant is charged with committing an organized retail crime involving the possession or receipt of stolen retail merchandise. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that some property was [stolen / explicitly represented to the defendant as being stolen] from a retail merchant. [It does not matter whether the property was actually stolen, if you believe that someone represented to the defendant that it was stolen.[1]]

(3) Second, that the property was retail merchandise, which is a new article, product, commodity, item, or component that was intended for sale in retail commerce.

(4) Third, that the defendant [received / bought / possessed] the merchandise.

(5) Fourth, that, when the defendant [received / bought / possessed] the merchandise, [he / she] knew or believed that it was stolen. [It does not matter whether the property was actually stolen, if you believe that someone told the defendant that it was stolen.[1]]

(6) Fifth, that, when the defendant [received / bought / possessed] the merchandise, [he / she] intended that the merchandise would be resold or distributed, or would otherwise be reentered in commerce. Reentering the merchandise in commerce includes transferring it to another person or another business that sells merchandise at retail. A transfer may be done personally, by mail, or through any electronic medium, including the internet, but it must be intended to be done in exchange for something of value. It does not matter whether the reentry or transfer of the merchandise actually took place, so long as the defendant intended that it take place at the time that it was taken.

Use Note

1. Read this sentence only when providing the second option that the property was represented to the defendant as being stolen.

[NEW] M Crim JI 10.9b Organized Retail Crime – Subterfuge

(1) The defendant is charged with committing an organized retail crime by evading detection of the theft of retail merchandise. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [removed, destroyed, deactivated, or evaded an antishoplifting or inventory device / used an artifice, instrument, container, device, or other article / deliberately caused a fire alarm to sound].

(3) Second, that the defendant [removed, destroyed, deactivated, or evaded an antishoplifting or inventory device / used an artifice, instrument, container, device, or other article / deliberately caused a fire alarm to sound] so that [he / she] or others could take property without the owner's consent from a person or a business that sells merchandise at retail.

(4) Third, that the property stolen or intended to be stolen was retail merchandise, which is a new article, product, commodity, item, or component that was intended for sale in retail commerce.

(5) Fourth, that, when the defendant [removed, destroyed, deactivated, or evaded an antishoplifting or inventory device / used an artifice, instrument, container, device, or other article / deliberately caused a fire alarm to sound], [he / she] intended to [permanently deprive the owner of the retail merchandise that was taken or intended to be taken / cheat the owner out of the value of the retail merchandise that was taken[1]].

(6) Fifth, that when the retail merchandise was taken, the defendant intended that the merchandise would be resold, distributed, or otherwise would be reentered in commerce. Reentering the merchandise in commerce includes transferring it to another person or another business that sells merchandise at retail or transferring it to another person. A transfer may be done personally, by mail, or through any electronic medium, including the internet, but it must be intended to be done in exchange for something of value. It does not matter whether the reentry or transfer of the merchandise actually took place, so long as the defendant intended that it take place at the time that it was taken.

Use Note

1. Use the second option only when the defendant makes a return of the stolen merchandise to the original owner for a fraudulent refund.

[NEW] M Crim JI 10.9c Organized Retail Crime – Telecommunications Device

(1) The defendant is charged with committing an organized retail crime involving a telecommunications device. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.

(2) First, that the defendant purchased a wireless telecommunications device.

(3) Second, that the defendant purchased the device using fraudulent credit.

(4) Third, that, at the time that the defendant purchased the device, [he / she] knew that the method of payment that [he / she] used was fraudulent.

(5) Fourth, that when the defendant used fraudulent credit to purchase the wireless telecommunications device, [he / she] intended to defraud or cheat someone.

[NEW] M Crim JI 10.9d Organized Retail Crime – Telecommunications Service Agreement

(1) The defendant is charged with committing an organized retail crime involving a wireless telecommunications service agreement. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt.

(2) First, that the defendant [obtained / used another person to obtain] a wireless telecommunications service agreement with [*name of the wireless telecommunication company*].

(3) Second, that when the defendant [obtained / used the other person to obtain] the service agreement [he / she] intended to break the agreement, in order to cheat [*name of the wireless telecommunications company*], or [he / she] intended to defraud or cheat someone.

Public Policy Position
Model Criminal Jury Instructions 10.9, 10.9a, 10.9b, 10.9c, and 10.9d

The Criminal Jurisprudence & Practice Committee Supports Model Criminal Jury Instructions 10.9, 10.9a, 10.9b, 10.9c, and 10.9d with an Amendment.

Explanation
The committee voted unanimously to support the criminal jury instructions and recommend that the Jury Instructions Committee consider substituting another word for the term "cheat" which is more consistent with the statute word of "defraud."

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by February 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes new instructions, M Crim JI 11.39, 11.39a and 11.39b, for the "explosives" statutes found at MCL 750.204, 750.204a, 750.207 and 750.212.

[NEW] M Crim JI 11.39 Explosives – Sending

(1) The defendant is charged with sending or delivering an explosive substance or dangerous thing for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [(sent / delivered) an (explosive substance[1] / dangerous thing) / caused an (explosive substance / dangerous thing) to be taken or received].

(3) Second, that when the defendant [(sent / delivered) the (explosive substance / dangerous thing) / caused (an explosive substance / dangerous thing) to be taken or received], [he / she] intended to frighten, terrorize, intimidate, threaten, harass, injure, or kill [(*name complainant*) / any person], or did so to damage or destroy any real or personal property without the permission of [(*name complainant*) / the owner of the property / a governmental agency with authority over the public property].

[*Select from paragraphs (4) through (8) where one of the following aggravating factors has been charged:*]

(4) Third, that the [sending / delivery] of the [explosive substance / dangerous thing)] damaged property.

(5) [Third, that / You may also consider whether[2]] the [sending / delivery] of the [explosive substance / dangerous thing)] caused physical injury [not amounting to serious impairment of a bodily function[2]] to another person.

(6) Third, that the [sending / delivery] of the [explosive substance / dangerous thing] caused a serious impairment of a bodily function to another person.[3]

(7) Third, that the [sending / delivery] of the [explosive substance / dangerous thing] caused the death of another person.

(8) Third, that the [sending / delivery] of the [explosive substance / dangerous thing] occurred in or was directed at [a child care or day care facility / a health care facility or agency / a building or structure open to the general public / a church, synagogue, mosque, or other place of religious worship / a school of any type / an institution of higher learning / a stadium / a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad) / an airport / a port / a natural gas refinery, storage facility, or pipeline / an electric, steam, gas, telephone, power, water, or pipeline facility / a nuclear power plant, reactor facility, or waste storage area / a petroleum refinery, storage facility, or pipeline / a vehicle, locomotive or railroad car, aircraft, or watercraft used to transport persons or goods / a government-owned building, structure, or other facility].[4]

Use Note

1. There is no statutory definition of "explosive substance" or "dangerous thing."

2. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a "physical injury," rather than a "serious impairment of a bodily function."

3. The definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

(a)Loss of a limb or loss of use of a limb.

(b)Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c)Loss of an eye or ear or loss of use of an eye or ear.
(d)Loss or substantial impairment of a bodily function.
(e)Serious visible disfigurement.
(f)A comatose state that lasts for more than 3 days.
(g)Measurable brain or mental impairment.
(h)A skull fracture or other serious bone fracture.
(i)Subdural hemorrhage or subdural hematoma.
(j)Loss of an organ.

4. MCL 750.212a.

Reference

Statutes

MCL 750.204; 750.212a

[NEW] M Crim JI 11.39a Explosives – Placing

(1) The defendant is charged with placing an explosive substance for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant placed an explosive substance[1] in or near any real or personal property.

(3) Second, that when the defendant placed the explosive substance, [he / she] did so to frighten, terrorize, intimidate, threaten, harass, injure, or kill any person, or did so to damage or destroy any real or personal property without the permission of the owner or a governmental agency with authority over the property, if it is public property.

[*Select from paragraphs (4) through (8) where one of the following aggravating factors has been charged:*]

(4) Third, that the placement of the explosive substance damaged property.

(5) [Third, that / You may also consider whether[2]] the placement of the explosive substance caused physical injury [not amounting to serious impairment of a bodily function[2]] to another person.

(6) Third, that the placement of the explosive substance caused a serious impairment of a bodily function to another person.[3]

(7) Third, that the placement of the explosive substance caused the death of another person.

(8) Third, that the placement of the explosive substance occurred in or was directed at [a child care or day care facility / a health care facility or agency / a building or structure open to the general public / a church, synagogue, mosque, or other place of religious worship / a school of any type / an institution of higher learning / a stadium / a transportation structure or facility open to the public (such as a bridge, tunnel, highway, or railroad) / an airport / a port / a natural gas refinery, storage facility, or pipeline / an electric, steam, gas, telephone, power, water, or pipeline facility / a nuclear power plant, reactor facility, or waste storage area / a petroleum refinery, storage facility, or pipeline / a vehicle, locomotive or

railroad car, aircraft, or watercraft used to transport persons or goods / a government-owned building, structure, or other facility].[4]

Use Note

1. There is no statutory definition of "explosive substance" or "dangerous thing."

2. Use this language only when there is a dispute over the level of injury, and the jury is considering the lesser offense that the defendant caused a "physical injury," rather than a "serious impairment of a bodily function."

3. The definitional statute, MCL 750.200h, cites MCL 257.58c, which provides that serious impairment of a body function includes, but is not limited to, one or more of the following:

(a)Loss of a limb or loss of use of a limb.
(b)Loss of a foot, hand, finger, or thumb or loss of use of a foot, hand, finger, or thumb.
(c)Loss of an eye or ear or loss of use of an eye or ear.
(d)Loss or substantial impairment of a bodily function.
(e)Serious visible disfigurement.
(f)A comatose state that lasts for more than 3 days.
(g)Measurable brain or mental impairment.
(h)A skull fracture or other serious bone fracture.
(i)Subdural hemorrhage or subdural hematoma.
(j)Loss of an organ.

4. MCL 750.212a.

Reference

Statutes

MCL 750.207; 750.212a

[NEW] M Crim JI 11.39b Explosives – False Bomb

(1) The defendant is charged with possessing, delivering, or placing a device that was constructed to look like an explosive device for an unlawful purpose. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant [possessed / delivered / sent / transported / placed] a device.

(3) Second, that the device was [made to appear to be an explosive, an incendiary device, or a bomb / described as being an explosive, an incendiary device or a bomb].

(4) Third, that, when the defendant [possessed / delivered / sent / transported / placed] the device, [he / she] intended to frighten, terrorize, intimidate, threaten, harass, or annoy [(*name complainant*) / a person].

Use Note

MCL 750.204a(2) permits prosecution of this offense in various jurisdictions. The "venue" instruction, M Crim JI 3.10, may have to be altered to explain why the violation may be prosecuted in Michigan.

Reference

Statutes

MCL 750.204a; 750.212a

Public Policy Position
Model Criminal Jury Instructions 11.39, 11.39a, and 11.39b

The Criminal Jurisprudence & Practice Committee Supports Model Criminal Jury Instructions 11.39, 11.39a, and 11.39b

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by January 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

The Committee proposes amendments to M Crim JI 15.11a and 15.12a, the instructions for driving with Schedule 1 or 2 substances causing death or serious injury under MCL 257.625(4), (5) and (8). The amendments are intended to correct over-broad language in paragraph (4) that included all Schedule 2 substances, where only certain of those substances are included within the purview of the statute. Deletions are in strike-through; new language is underlined.

[AMENDED] M Crim JI 15.11a Operating with Any Amount of Schedule 1 or 2 Controlled Substance Causing Death

(1) The defendant is charged with the crime of operating a motor vehicle with a controlled substance in [his / her] body causing the death of another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was operating a motor vehicle on or about [*state date*] in the [county / city] of [*state jurisdiction*]. Operating means driving or having actual physical control of the vehicle.

(3) Second, that the defendant was operating the vehicle on a highway or other place that was open to the public [or generally accessible to motor vehicles, including any designated parking area].

(4) Third, that while operating the vehicle, the defendant had any amount of [*state specific schedule 1 ~~or 2~~ controlled substance ~~alleged~~ or controlled substance in MCL 333.7214(a)(iv) alleged by the prosecutor*] in [his / her] body.

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he / she] had consumed or used a controlled substance.

(6) Fifth, that the defendant's operation of the vehicle caused the victim's death. To "cause" the victim's death, the defendant's operation of the vehicle must have been a factual cause of the death, that is, but for the defendant's operation of the vehicle the death would not have occurred. In addition, operation of the vehicle must have been a proximate cause of death, that is, death or serious injury must have been a direct and natural result of operating the vehicle.

Use Note
This instruction is intended to state the elements of the offense found at MCL 257.625(4) and (8).

[AMENDED] M Crim JI 15.12a Operating With Any Amount of Schedule 1 or 2 Controlled Substance Causing Serious Impairment of a Body Function

(1) The defendant is charged with the crime of operating a motor vehicle with any amount of a controlled substance causing serious impairment of a body function to another person. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was operating a motor vehicle on or about [*state date*] in the [county / city] of [*state jurisdiction*]. Operating means driving or having actual physical control of the vehicle.

(3) Second, that the defendant was operating the vehicle on a highway or other place that was open to the public [or generally accessible to motor vehicles, including any designated parking area].

(4) Third, that while operating the vehicle, the defendant had any amount of [*state specific schedule 1 ~~or 2~~ controlled substance ~~alleged~~ or controlled substance in MCL 333.7214(a)(iv) alleged by the prosecutor*] in [his / her] body.

(5) Fourth, that the defendant voluntarily decided to drive knowing that [he / she] had consumed or used a controlled substance.

(6) Fifth, that the defendant's operation of the vehicle caused a serious impairment of a body function to [*name victim*]. To "cause" such injury, the defendant's operation of the vehicle must have been a factual cause of the injury,

that is, but for the defendant's operation of the vehicle the injury would not have occurred. In addition, operation of the vehicle must have been a proximate cause of the injury, that is, the injury must have been a direct and natural result of operating the vehicle.

Use Note

This instruction is intended to state the elements of the offense found at MCL 257.625(5) and (8).

Public Policy Position
Model Criminal Jury Instructions 15.11a and 15.12a

The Criminal Jurisprudence & Practice Committee Supports Model Criminal Jury Instructions 15.11a and 15.12a with an Amendment.

Explanation
The committee voted unanimously to support the criminal jury instructions with one amendment of the title as follows: Operating with Any Amount of Schedule 1 ~~or 2~~ Controlled Substance or Cocaine.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

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The Committee solicits comment on the following proposal by January 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

==========

PROPOSED

The Committee proposes an amendment to M Crim JI 17.20 and a new instruction, M Crim JI 17.20c, instructions for violations of MCL 750.136b(3), second-degree child abuse. The amendment to M Crim JI 17.20 is intended to conform the instruction to statutory language that was omitted in the original instruction and to make technical corrections; deletions are in strike-through; new language is underlined. The new instruction, M Crim JI 17.20c, is for second-degree child abuse charges that were committed by a child care organization where there has been a violation of MCL 722.111 et seq.

[AMENDED] M Crim JI 17.20 Child Abuse, Second Degree (Reckless Act or Omission Causing Serious Injury)

(1) The defendant is charged with second-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

[*Choose (2) or (3):*]

(2) First, that ~~[*name defendant*]~~ the defendant is the [parent / guardian] of [*name child*].

(3) First, that ~~[*name defendant*]~~ the defendant had care or custody of or authority over [*name child*] when the abuse allegedly happened.

[*Choose (4) or (5):*]

(4) Second, that the defendant did some reckless act.

(5) Second, that the defendant willfully [failed to provide food, clothing, or shelter necessary for [*name child*]'s welfare / abandoned [*name child*]].

(6) Third, that as a result, [*name child*] suffered serious physical harm. By "serious physical harm" I mean any physical injury to a child that seriously impairs the child's health or physical well-being, including, but not limited to, brain damage, a skull or bone fracture, subdural hemorrhage or hematoma, dislocation, sprain, internal injury, poisoning, burn or scald, or severe cut.

(7) Fourth, that [*name child*] was at the time under the age of 18.

Use Note

The statutory language indicates this is a general intent crime. The jury should be instructed on parental discipline, M Crim JI 17.24, when this is raised as a defense.

[NEW] M Crim JI 17.20c Child Abuse, Second Degree (Child Care Provider)

(1) The defendant is charged with second-degree child abuse. To establish this charge, the prosecution must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant was [a licensed child care organization or agency / a representative or officer of a licensed corporation, association, or organization providing care, maintenance, training, or supervision of persons less than 18 years of age][1] .

(3) Second, that [*name defendant*] had care or custody of or authority over [*name child*] when the abuse allegedly occurred.

(4) Third, that the defendant violated a rule for family and group homes, in particular that defendant: [*provide alleged statutory violation in the Child Care Organizations Act, MCL 722.111 et seq.*].

(5) Fourth, that as a result of violating the rule, [*name child*] died.

(6) Fifth, that [*name child*] was at the time under the age of 18.

Use Note

1. See MCL 722.111 et seq.

Public Policy Position
Model Criminal Jury Instructions 17.20 and 17.20c

The Criminal Jurisprudence & Practice Committee Supports Model Criminal Jury Instructions 17.20 and 17.20c.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by January 1, 2018. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes an amendment to M Crim JI 17.33, the instruction for violations of MCL 750.145n, which was amended to expand the scope of the statute, and to make technical corrections to the first and third paragraphs. Deletions are in strike-through; new language is underlined.

[AMENDED] M Crim JI 17.33 Vulnerable Adult Abuse, Fourth Degree

(1) The defendant is charged with vulnerable adult abuse in the fourth degree. To prove this charge, the prosecutor must prove the following elements beyond a reasonable doubt:

(2) First, that ~~[*name defendant*]~~ defendant was a caregiver[1] or other person with authority over [*name complainant*].

[*Select from (3) or (4):*]

(3) Second, that the defendant by [his / her] reckless act or reckless failure to act caused physical harm to [*name complainant*].[2]

(4 a) By "reckless act or reckless failure to act" I mean that the defendant's conduct demonstrates a deliberate disregard of the likelihood that the natural tendency of the act or failure to act is to cause serious physical harm or serious mental harm.

(~~5~~ b) By "physical harm" I mean any injury to a vulnerable adult's physical condition.

(4) Second, that the defendant intentionally committed an act that, under the circumstances, posed an unreasonable risk of harm or injury to a vulnerable adult, regardless of whether [he / she] actually sustained a physical injury.

(5) Third, that [*name complainant*] was at the time a "vulnerable adult." The term *vulnerable adult* means

[*Choose (a), (b), or (c) or any combination of the three:*][3]

(a) An individual age 18 or over who, because of age, developmental disability, mental illness, or physical handicap requires supervision or personal care or lacks the personal and social skills required to live independently.

(b) A person 18 years of age or older who is placed in an adult foster care family home or an adult foster care small group home.

(c) A person not less than 18 years of age who is suspected of being or believed to be abused, neglected, or exploited.

Use Notes

1. *Caregiver* is defined by the statute as an individual who directly cares for or has physical custody of a vulnerable adult. MCL 750.145m(c).

2. The statutory language indicates that this is a general intent crime.

3. The statute sets forth three separate definitions for the term *vulnerable adult*, which, in a particular case, may be limited to one or may include one or more of such definitions. MCL 750.145m(u).

Public Policy Position
Model Criminal Jury Instructions 17.33

The Criminal Jurisprudence & Practice Committee Supports Model Criminal Jury Instructions 17.33.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

FROM THE COMMITTEE ON MODEL CRIMINAL JURY INSTRUCTIONS

==========

The Committee solicits comment on the following proposal by November 1, 2017. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov .

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PROPOSED

The Committee proposes an amendment to M Crim JI 36.5, the instruction that provides the aggravating factors found in MCL 750.462f that apply to the human trafficking instructions. The amendment accommodates an amendment to that statute. The new language is underlined.

[AMENDED] M Crim JI 36.5 Aggravating Factors

(1) If you find that the defendant is guilty of [obtaining a person for forced labor or services / holding a person in debt bondage / knowingly subjecting a person to forced labor or services or debt bondage / participating in an enterprise involving forced labor, debt bondage or commercial sex for financial gain], then you must decide whether the prosecutor has proved the following aggravating element[s] beyond a reasonable doubt:

[*Select from the following. Proving a bodily injury under (5) below may be a lesser offense where serious bodily injury has been charged under (4).*]

(2) That the violation involved

[*Select one or more as warranted by the evidence:*]

(a) kidnapping or attempted kidnapping of [*name complainant*]. Kidnapping means restraining someone for ransom, to use as a shield, to engage in criminal sexual conduct, to take out of the state, or to hold in involuntary servitude.

(b) first-degree criminal sexual conduct or attempted first-degree criminal sexual conduct of [*name complainant*]. First-degree criminal sexual conduct is sexual penetration of a person [provide particular elements that may apply from M Crim JI 20.3 through 20.11].

(c) an attempt to kill [*name complainant*].

(d) the death of [*name complainant*].

(3) That the violation resulted in serious bodily injury to [*name complainant*]. A serious bodily injury is any physical injury that requires medical treatment. It does not matter whether [*name complainant*] tried to get medical treatment.

(4) That the violation resulted in [*name complainant*] being engaged in commercial sexual activity. "Commercial sexual activity"[1] means performing acts of sexual penetration or contact,[2] child sexually abusive activity,[3] or a sexually explicit performance.[4]

(5) [That the violation / You may also consider the less serious offense that the violation[5]] resulted in bodily injury to [*name complainant*]. Bodily injury is any physical injury.

Use Note

1. Definitions of *commercial sexual activity* are found in MCL 750.462a.

2. Definitions of *sexual penetration* and *sexual contact* are found in MCL 750.520a.

3. *Child sexually abusive activity* is defined in MCL 750.145c(1)(n) as a child engaging in a "listed sexual act."

   Listed sexual act is defined in MCL 750.145c(1)(i) as "sexual intercourse, erotic fondling, sadomasochistic abuse, masturbation, passive sexual involvement, sexual excitement, or erotic nudity." Those terms, in turn, are each defined in MCL 750.145c(1), and the court may provide definitions where appropriate.

4. *Sexually explicit performance* is defined in MCL 722.673(g) as "a motion picture, video game, exhibition, show, representation, or other presentation that, in whole or in part, depicts nudity, sexual excitement, erotic fondling, sexual intercourse, or sadomasochistic abuse."

5. The lesser offense language only applies where "serious bodily injury" is charged and paragraph (3) is read to the jury.

Public Policy Position
Model Criminal Jury Instructions 36.5

The Criminal Jurisprudence & Practice Committee Supports Model Criminal Jury Instructions 36.5.

Number who voted in favor and opposed to the position:
Voted For position: 10
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Janet Welch, Executive Director
Peter Cunningham, Director of Governmental Relations
Kathryn Hennessey, Public Policy Counsel

Date: January 17, 2018

Re: HB 5244 and HB 5246

Background
HB 5244 and 5246 establish a timeline of 45 days for completion of competency examinations, allowing for an extension of up to 15 days upon a showing of good cause. To meet these deadlines, the bill also allows the Department of Corrections to certify additional facilities to conduct the examinations. If the competency examination is not completed within the bill's time limitation, the court may issue an order that includes steps to complete the examination as soon as possible, including ordering another certified facility to conduct the examination.

***Keller* Considerations**
Despite taking different positions on the bills, the ATJ Policy and Criminal Jurisprudence and Practice committees both agree that the bills are permissible under *Keller*.

The ATJ Policy Committee found the bills to be *Keller*-permissible based on their view that the bills would improve the functioning of the courts by helping to ensure timely competency evaluations and that criminal defendants receive a speedy trial. The Criminal Jurisprudence and Practice Committee found the bills to be *Keller* permissible because they concluded that the bills would set impossible time limits for the court's handling of mental health cases, and thus negatively impact the functioning of the courts.

Although the two committees have different perspectives on the bills, the bills are focused, in part, on how courts handle competency examinations. Proponents of the bills have argued that the bills are needed because competency exams can often lead to lengthy delays in criminal cases, and these bills would provide courts with additional tools to speed up the process.

Portions of the bills are probably outside the *Keller* limitations. For example, the Prisons and Corrections Section opposes the bills primarily over licensing concerns for facilities conducting competency examinations.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	
Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	
• Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
• Ethics	• Availability of legal services to society
• Lawyer competency	
• Integrity of the Legal Profession	
• Regulation of attorney trust accounts	

Staff Recommendation

To the extent that the bills deal with court procedures for handling competency exams in criminal proceedings, the bills satisfy the requirements of *Keller* and may be considered on their merits.

HOUSE BILL No. 5244

November 9, 2017, Introduced by Reps. Kesto, Rendon and Whiteford and referred to the Committee on Law and Justice.

A bill to amend 1974 PA 258, entitled

"Mental health code,"

by amending section 1028 (MCL 330.2028).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1028. (1) When the defendant is ordered to undergo an examination ~~pursuant to~~ **UNDER** section 1026, the center or other facility shall, for the purpose of gathering psychiatric and other information pertinent to the issue of the incompetence of the defendant to stand trial, examine the defendant and consult with defense counsel, and may consult with the prosecutor or other persons. Defense counsel shall make himself **OR HERSELF** available for consultation with the center or other facility. The examination shall be performed, defense counsel consulted, and a written report submitted to the court, prosecuting attorney, and defense counsel

HOUSE BILL No. 5244

within 60 days of the date of the order.

(2) THE DIRECTOR OF THE CENTER OR OTHER CERTIFIED FACILITY MAY APPLY WITH THE COURT FOR AN EXTENSION, BUT NOT TO EXCEED 15 DAYS, UPON A SHOWING OF GOOD CAUSE THAT THE ADDITIONAL TIME IS NECESSARY TO COMPLETE THE REPORT. ONLY 1 EXTENSION MAY BE GRANTED. TO MEET THE TIME LIMITATIONS IN THIS SUBSECTION AND SECTION 1026(2), THE DEPARTMENT OF CORRECTIONS SHALL USE ALL AVAILABLE RESOURCES, INCLUDING, BUT NOT LIMITED TO, WORKING WITH THE DEPARTMENT TO OFFICIALLY CERTIFY FACILITIES ACROSS THE STATE TO PERFORM EXAMINATIONS RELATING TO THE ISSUE OF INCOMPETENCE TO STAND TRIAL AND TO USE CLINICIANS IN THOSE OTHER CERTIFIED FACILITIES TO PERFORM EXAMINATIONS. IF THE EXAMINATION IS NOT COMPLETED WITHIN THE TIME LIMITATIONS SET FORTH IN THIS SUBSECTION, THE COURT MAY ISSUE AN ORDER THAT INCLUDES IMMEDIATE STEPS TO COMPLETE THE EXAMINATION AS SOON AS POSSIBLE, INCLUDING, BUT NOT LIMITED TO, ORDERING ANOTHER CERTIFIED FACILITY TO CONDUCT THE EXAMINATION.

(3) ~~(2)~~ The report shall contain **THE FOLLOWING:**

(a) The clinical findings of the center or other facility.

(b) The facts, in reasonable detail, upon which the findings are based, and upon request of the court, defense, or prosecution additional facts germane to the findings.

(c) The opinion of the center or other facility on the issue of the incompetence of the defendant to stand trial.

(d) If the opinion is that the defendant is incompetent to stand trial, the opinion of the center or other facility on the likelihood of the defendant attaining competence to stand trial, if provided a course of treatment, within the time limit established

by section 1034.

(4) ~~(3)~~ The opinion concerning competency to stand trial derived from the examination may not be admitted as evidence for any purpose in the pending criminal proceedings, except on the issues to be determined in the hearings required or permitted by sections 1030 and 1040. The foregoing bar of testimony ~~shall~~ **DOES** not ~~be construed to~~ prohibit the examining qualified clinician from presenting at other stages in the criminal proceedings opinions concerning criminal responsibility, disposition, or other issues if they were originally requested by the court and are available. Information gathered in the course of a prior examination that is of historical value to the examining qualified clinician may be utilized in the formulation of an opinion in any subsequent court ordered evaluation.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

Enacting section 2. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No. 5246 (request no. 04648'17) of the 99th Legislature is enacted into law.

HOUSE BILL No. 5246

November 9, 2017, Introduced by Reps. Kesto, Rendon and Whiteford and referred to the Committee on Law and Justice.

A bill to amend 1974 PA 258, entitled

"Mental health code,"

by amending section 1026 (MCL 330.2026).

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1026. (1) Upon a showing that the defendant may be incompetent to stand trial, the court shall order the defendant to undergo an examination by personnel of either the center for forensic psychiatry or other facility officially certified by the department ~~of mental health~~ to perform examinations relating to the issue of incompetence to stand trial. The defendant shall make himself **OR HERSELF** available for the examination at the places and times established by the center or other certified facility. If the defendant, after being notified, fails to make himself **OR HERSELF** available for the examination, the court may order his **OR HER**

HOUSE BILL No. 5246

commitment to the center or other facility without a hearing.

(2) THE TIMES SET FOR THE EXAMINATIONS ESTABLISHED BY THE CENTER OR OTHER CERTIFIED FACILITY MUST BE FOR A REASONABLE PERIOD NOT TO EXCEED 45 DAYS. THE DIRECTOR OF THE CENTER OR OTHER CERTIFIED FACILITY MAY APPLY WITH THE COURT FOR AN EXTENSION, BUT NOT TO EXCEED 15 DAYS, UPON A SHOWING OF GOOD CAUSE THAT THE ADDITIONAL TIME IS NECESSARY TO OBSERVE AND EVALUATE THE DEFENDANT. THIS SUBSECTION DOES NOT LIMIT, EXTEND, OR IN ANY WAY CHANGE THE TIME LIMITATION IN SECTION 1028(2) FOR A WRITTEN REPORT TO BE SUBMITTED TO THE COURT. TO MEET THE TIME LIMITATIONS IN THIS SUBSECTION AND SECTION 1028(2), THE DEPARTMENT OF CORRECTIONS SHALL USE ALL AVAILABLE RESOURCES, INCLUDING, BUT NOT LIMITED TO, WORKING WITH THE DEPARTMENT TO OFFICIALLY CERTIFY OTHER FACILITIES ACROSS THE STATE TO PERFORM EXAMINATIONS RELATING TO THE ISSUE OF INCOMPETENCE TO STAND TRIAL AND TO USE CLINICIANS IN THOSE OTHER CERTIFIED FACILITIES TO PERFORM EXAMINATIONS. IF THE EXAMINATION IS NOT COMPLETED WITHIN THE TIME LIMITATIONS SET FORTH IN THIS SUBSECTION, THE COURT MAY ISSUE AN ORDER THAT INCLUDES IMMEDIATE STEPS TO COMPLETE THE EXAMINATION AS SOON AS POSSIBLE, INCLUDING, BUT NOT LIMITED TO, ORDERING ANOTHER CERTIFIED FACILITY TO CONDUCT THE EXAMINATION.

(3) ~~(2)~~ When the defendant is to be held in a jail or similar place of detention pending trial, the center or other facility may perform the examination in the jail or may notify the sheriff to transport the defendant to the center or other facility for the examination, and the sheriff shall return the defendant to the jail upon completion of the examination. **THE EXAMINATION, WHETHER**

COMPLETED IN A JAIL OR AT THE CENTER OR OTHER FACILITY, IS SUBJECT TO THE TIME LIMITATIONS SET FORTH IN SUBSECTION (2) FOR EXAMINATIONS.

(4) ~~(3)~~ Except as provided in subsection (1), when the defendant is not to be held in a jail or similar place of detention pending trial, the court shall commit him **OR HER** to the center or other facility only when the commitment is necessary for the performance of the examination.

(5) ~~(4)~~ The defendant shall be released by the center or other facility upon completion of the examination.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

Enacting section 2. This amendatory act does not take effect unless Senate Bill No.____ or House Bill No. 5244 (request no. 04649'17) of the 99th Legislature is enacted into law.

Legislative Analysis

Phone: (517) 373-8080
http://www.house.mi.gov/hfa

Analysis available at
http://www.legislature.mi.gov

EXAMINATIONS TO DETERMINE INCOMPETENCY TO STAND TRIAL

House Bills 5244 and 5246 as introduced
Sponsor: Rep. Klint Kesto
Committee: Law and Justice
Complete to 11-27-17

BRIEF SUMMARY:

House Bill 5246 would establish a time limitation for when an examination to determine whether a defendant is competent to stand trial must be completed, allow for an extension if good cause is shown, allow the Department of Corrections to certify additional facilities to conduct the examinations, and allow a court to issue an order to complete the examination as soon as possible.

House Bill 5244 would grant a 1-time extension for the completion of a written report that is required to be submitted to the court and both parties regarding the examination.

House Bills 5244 and 5246 are tie-barred to each other, which means that neither can take effect unless both are enacted. Each bill would take effect 90 days after its enactment.

DETAILED SUMMARY:

House Bill 5246 would amend Section 1026 of the Mental Health Code (MCL 330.2026). Currently, upon a showing that a defendant may be incompetent to stand trial, the court is required to order the defendant to undergo an examination by personnel of the Center for Forensic Psychiatry or another facility officially certified by the Michigan Department of Health and Human Services (DHHS) to perform examinations relating to the issue of incompetence to stand trial. The Center for Forensic Psychiatry is a 210-bed psychiatric facility operated by DHHS that provides diagnostic services to the criminal justice system and psychiatric treatment for criminal defendants adjudicated incompetent to stand trial or found not guilty by reason of insanity.

The defendant must make himself or herself available for the examination at the places and times established by the Center or other facility. The court can order the defendant committed to the Center if he or she fails to make himself or herself available for the examination.

HB 5246 would require the times set for the examinations to be for a reasonable period not to exceed 45 days. The director of the Center or other certified facility could apply for an extension of up to 15 days upon a showing of good cause that the additional time was necessary to observe and evaluate the defendant. This provision would not limit, extend, or in any way change the time limitation for a written report proposed by House Bill 5244.

To meet the time limitations under both bills, the Department of Corrections would have to use all available resources, including, but not limited to, working with DHHS to officially certify other facilities across the state to perform incompetency examinations and to use clinicians in those other certified facilities to perform examinations. If an examination was not completed within the bill's time limitations, the court could issue an order that included steps to complete the examination as soon as possible. This could include, but not be limited to, ordering another certified facility to conduct the examination.

Further, current law allows the examination to be performed by the Center or other facility in the jail and also allows the sheriff to transport a defendant to and from the Center or other facility for the examination. HB 5246 would specify that an examination would be subject to the bill's time limitations whether completed in a jail or at the Center or other facility.

House Bill 5244 would amend Section 1028 of the Mental Health Code (MCL 330.2028). After an examination to determine competency to stand trial is performed, a written report must be submitted to the court, prosecuting attorney, and defense counsel within 60 days of the order to perform the examination.

The bill would allow the director of the Center or other certified facility to apply with the court for an extension of up to 15 days upon a showing of good cause that the additional time is necessary to complete the report. Only 1 extension could be granted. To meet the time limitation, the Department of Corrections would have to use all available resources, including, but not limited to, working with DHHS to officially certify other facilities across the state to perform the incompetency examinations described in House Bill 5246 and to use clinicians in those other certified facilities to perform those examinations. If the examination was not completed within the bill's time limitations, the court could issue an order that included immediate steps to complete the examination as soon as possible. This could include, but not be limited to, ordering another certified facility to conduct the examination.

FISCAL IMPACT:

House Bills 5244 and 5246 would have an indeterminate fiscal impact. Any increased costs for the Center for Forensic Psychiatry within the Department of Health and Human Services would depend on the degree to which the bills' time limitations differ from the current timeliness standards at the Center for Forensic Psychiatry and on the frequency at which the court decides to grant extensions to submit reports.

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Kevin Koorstra

■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.

Public Policy Position
HB 5244 & 5246

The Access to Justice Policy Committee Supports HB 5244 and 5246 as long as Adequate Funds Are Allocated to Support the Speedier Competency Examination Process.

Explanation

HB 5244 and 5246 establish a timeline of 45 days for completion of competency examinations, allowing for an extension of up to 15 days upon a showing of good cause. To meet these deadlines, the bill also allows the Department of Corrections to certify additional facilities to conduct the examinations. If the competency examination is not completed within the bill's time limitation, the court may issue an order that includes steps to complete the examination as soon as possible, including ordering another certified facility to conduct the examination.

Currently, courts are forced to fight with forensic examiners to obtain a timely competency examination, which can even involve the court issuing a show cause order. At times, the wait for a competency evaluation can be over 6 months, and there is little willingness for the examiners to speed up the process. This unreasonably long delay affects defendants' rights to a speedy trial and, if found incompetent to stand trial, defendants' ability to receive necessary mental health services.

The Access to Justice Committee agrees with the concerns raised by the Criminal Jurisprudence and Practice Committee about the need for adequate funding to support the speedier examination process; therefore, the Access to Justice Committee unanimously supports HB 5244 and 5246 as long as sufficient funding is allocated to provide the resources that certified facilities will need to complete the competency examinations within the timeline set forth in the bills.

Number who voted in favor and opposed to the position:
Voted For position: 19
Voted against position: 0
Abstained from vote: 0
Did note vote: 7

***Keller* Explanation**
HB 5244 and 5246 are *Keller*-permissible because they would improve the functioning of the courts by helping to ensure timely competency evaluations and that criminal defendants receive a speedy trial.

Contact Person: Valerie Newman
Email: vnewman@waynecounty.com

Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

Public Policy Position
HB 5244 and HB 5246

The Criminal Jurisprudence & Practice Committee Opposes HB 5244 and HB 5246.

Explanation
The committee opposed these bills because they impose unrealistic timelines on court proceedings given the lack of funding provided for the Center for Forensic Psychiatry. While the House Fiscal Analysis notes that the legislation would have "an indeterminate fiscal impact," no additional funding is provided to the Center. Without this funding, it is unrealistic for the courts to meet the imposed deadlines.

Number who voted in favor and opposed to the position:
Voted For position: 9
Voted against position: 0
Abstained from vote: 1
Did note vote: 7

***Keller* Explanation**
HB 5244 and HB 5246 are *Keller* permissible because they impact the functioning of the courts. These bills would set impossible time limits for the court's handling of mental health cases.

Contact Person: Nimish R. Ganatra
Email: ganatran@ewashtenaw.org

Public Policy Position
HB 5244 and HB 5246

The Prisons & Corrections Section Opposes HB 5244 and HB 5246.

Explanation:
HB 5244 requires DHHS to license additional facilities to do competency examinations and HB 5246 draws the Michigan Department of Corrections into the licensing process for facilities licensed to do competency examinations. There are no other facilities that exist that could do competency evaluations and it would shift responsibility away from the state. The MDOC has no expertise or experience in this realm and does not have available resources to take on a completely new function which is not related to its primary functions.

Number who voted in favor and opposed to the position:
Voted For position: 9
Voted against position: 0
Abstained from vote: 2
Did note vote: 0

Contact Person: Sandra Girard

Email: slbgirard@gmail.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Janet Welch, Executive Director
Peter Cunningham, Director of Governmental Relations
Kathryn Hennessey, Public Policy Counsel

Date: January 17, 2018

Re: HB 4433

Background

MCL 712A.18e governs juvenile expungements, setting forth the requirements, restrictions, and procedure for having the adjudication of juvenile offenses set aside. HB 4433 proposes an amendment to MCL 712A.18e that would simplify the juvenile expungement procedure by eliminating the expungement hearing in cases where the underlying offense are not assaultive, do not involve a weapon, and carry a maximum penalty less than 10 years imprisonment.

***Keller* Considerations**

Committees and sections have disagreed on whether HB 4433 is permissible under *Keller*. The Criminal Jurisprudence and Practice Committee argues that the bill is not *Keller*-permissible because it only marginally affects the functioning of the courts and instead is more substantive in nature by granting new rights to juvenile offenders and circumventing the rights of crime victims. Both the Access to Justice Policy Committee and Criminal Law Section, however, found the bill to be *Keller*-permissible; by not requiring a hearing for certain expungements, the bill would increase judicial efficiency and improve the functioning of the courts for handling petitions to set aside juvenile convictions. Additionally, the ATJ Policy Committee found that the bill improves the availability of legal services, as it removes the financial barrier for forcing juvenile offender seeking expunction to travel – at times long distances – to attend a routine expungement hearing for a non-violent offense.

The ATJ Policy Committee supports HB 4433 with a number of amendments, some of which address the *Keller* concerns raised by the Criminal Jurisprudence and Practice Committee. In subsection (11), instead of the bill commanding the court the to set aside the adjudication of a qualifying juvenile offence, the ATJ Policy Committee recommends (1) that the court retain its discretion and "may, without holding a hearing, set aside the adjudication" of a qualifying juvenile offender and (2) only allow an expunction without a hearing if the victim does not request a hearing. With these changes, the bill is focused on creating a more efficient procedure for setting aside certain juvenile offenses without a hearing and offers the victim the opportunity to request a hearing, rather than creating a new absolute right for certain juvenile offenders to obtain an expungement without a hearing.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	
Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	
• Regulation and discipline of attorneys	✓ Improvement in functioning of the courts
• Ethics	• Availability of legal services to society
• Lawyer competency	
• Integrity of the Legal Profession	
• Regulation of attorney trust accounts	

Staff Recommendation

The bill satisfies the requirements of *Keller* and may be considered on its merits.

HOUSE BILL No. 4433

March 29, 2017, Introduced by Reps. Neeley, Jones, Sneller, Rabhi and Durhal and referred to the Committee on Law and Justice.

A bill to amend 1939 PA 288, entitled

"Probate code of 1939,"

by amending section 18e of chapter XIIA (MCL 712A.18e), as amended by 2016 PA 337.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER XIIA

Sec. 18e. (1) Except as provided in subsection (2), a person who has been adjudicated of not more than 1 juvenile offense that would be a felony if committed by an adult and not more than 3 juvenile offenses, of which not more than 1 may be a juvenile offense that would be a felony if committed by an adult and who has no felony convictions may file an application with the adjudicating court or adjudicating courts for the entry of an order setting

HOUSE BILL No. 4433

aside the adjudications. A person may have only 1 adjudication for an offense that would be a felony if committed by an adult and not more than 2 adjudications for an offense that would be a misdemeanor if committed by an adult or if there is no adjudication for a felony if committed by an adult, not more than 3 adjudications for an offense that would be a misdemeanor if committed by an adult set aside under this section. Multiple adjudications arising out of a series of acts that were in a continuous time sequence of 12 hours or less and that displayed a single intent and goal constitute 1 offense provided that none of the adjudications constitute any of the following:

(a) An assaultive crime as that term is defined in subsection (7).

(b) An offense involving the use or possession of a weapon.

(c) An offense with a maximum penalty of 10 or more years imprisonment.

(2) A person shall not apply under this section to have set aside, and a judge shall not under this section set aside, any of the following:

(a) An adjudication for an offense that if committed by an adult would be a felony for which the maximum punishment is life imprisonment.

(b) An adjudication for a traffic offense under the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923, or a local ordinance substantially corresponding to that act, that involves the operation of a vehicle and at the time of the violation is a felony or misdemeanor.

(c) A conviction under section 2d of this chapter. This subdivision does not prevent a person convicted under section 2d of this chapter from having that conviction set aside as otherwise provided by law.

(3) An application under this section shall not be filed until the expiration of 1 year following imposition of the disposition for the adjudication that the applicant seeks to set aside, or 1 year following completion of any term of detention for that adjudication, or when the person becomes 18 years of age, whichever occurs later.

(4) An application under this section is invalid unless it contains the following information and is signed under oath by the person whose adjudication is to be set aside:

(a) The full name and current address of the applicant.

(b) A certified record of the adjudication that is to be set aside.

(c) A statement that the applicant has not been adjudicated of a juvenile offense other than the juvenile offenses sought to be set aside as a result of this application.

(d) A statement that the applicant has not been convicted of any felony offense.

(e) A statement as to whether the applicant has previously filed an application to set aside this or any other adjudication and, if so, the disposition of the application.

(f) A statement as to whether the applicant has any other criminal charge pending against him or her in any court in the United States or in any other country.

(g) A consent to the use of the nonpublic record created under subsection ~~(13),~~ **(14)**, to the extent authorized by subsection ~~(13).~~**(14)**.

(5) The applicant shall submit a copy of the application and 2 complete sets of fingerprints to the department of state police. The department of state police shall compare those fingerprints with ~~the~~ **ITS OWN** records, ~~of the department,~~ including the nonpublic record created under subsection ~~(13),~~ **(14)**, and shall forward a complete set of fingerprints to the Federal Bureau of Investigation for a comparison with the records available to that agency. The department of state police shall report to the court in which the application is filed the information contained in the ~~department's~~ **DEPARTMENT OF STATE POLICE'S** records with respect to any pending charges against the applicant, any record of adjudication or conviction of the applicant, and the setting aside of any adjudication or conviction of the applicant and shall report to the court any similar information obtained from the Federal Bureau of Investigation. The court shall not act upon the application until the department of state police reports the information required by this subsection to the court.

(6) The copy of the application submitted to the department of state police under subsection (5) shall be accompanied by a fee of $25.00 payable to the state of Michigan. The department of state police shall use the fee to defray the expenses incurred in processing the application.

(7) A copy of the application shall be served upon the attorney general and, if applicable, upon the office of the

prosecuting attorney who prosecuted the offense. The attorney general and the prosecuting attorney shall have an opportunity to contest the application. If the adjudication was for an offense that if committed by an adult would be an assaultive crime or serious misdemeanor, and if the name of the victim is known to the prosecuting attorney, the prosecuting attorney shall give the victim of that offense written notice of the application and forward a copy of the application to the victim under section 46a of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.796a. The notice shall be sent by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under this section concerning that adjudication and to make a written or oral statement. As used in this subsection:

(a) "Assaultive crime" means that term as defined in section 9a of chapter X of the code of criminal procedure, 1927 PA 175, MCL 770.9a.

(b) "Serious misdemeanor" means that term as defined in section ~~31~~ **61** of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL ~~780.781.~~**780.811.**

(c) "Victim" means that term as defined in section ~~31~~ **61** of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL ~~780.781.~~**780.811.**

(8) Upon the hearing of the application, the court may require the filing of affidavits and the taking of proofs as it considers proper.

(9) Except as provided in ~~subsection (10),~~ **SUBSECTIONS (10)**

AND (11), if the court determines that the circumstances and behavior of the applicant from the date of the applicant's adjudication to the filing of the application warrant setting aside the 1 adjudication for a juvenile offense that would be a felony if committed by an adult and not more than 2 adjudications for a juvenile offense that would be a misdemeanor if committed by an adult or if there is no adjudication for a felony if committed by an adult, not more than 3 adjudications for an offense that would be a misdemeanor if committed by an adult and that setting aside the adjudication or adjudications is consistent with the public welfare, the court may enter an order setting aside the adjudication. Except as provided in ~~subsection (10),~~ **SUBSECTIONS (10) AND (11)**, the setting aside of an adjudication under this section is a privilege and conditional, and is not a right.

(10) If the person files an application with the court and he or she otherwise meets all the requirements, notwithstanding subsection (9), the court shall set aside the adjudication of a person as follows:

(a) The person was adjudicated for an offense that if committed by an adult would be a violation or an attempted violation of section 413 of the Michigan penal code, 1931 PA 328, MCL 750.413.

(b) The person was adjudicated for an offense that if committed by an adult would be a violation or an attempted violation of section 448, 449, or 450 of the Michigan penal code, 1931 PA 328, MCL 750.448, 750.449, and 750.450, or a local ordinance substantially corresponding to section 448, 449, or 450

of the Michigan penal code, 1931 PA 328, MCL 750.448, 750.449, and 750.450, and he or she committed the offense as a direct result of his or her being a victim of a human trafficking violation.

(11) NOTWITHSTANDING SUBSECTION (9), THE COURT SHALL, WITHOUT HOLDING A HEARING, SET ASIDE THE ADJUDICATION OF A PERSON WHO WAS ADJUDICATED FOR ANY OF THE FOLLOWING OFFENSES IF THE PERSON FILES AN APPLICATION WITH THE COURT AND OTHERWISE MEETS THE REQUIREMENTS OF THIS SECTION:

(A) AN OFFENSE THAT IS NOT AN ASSAULTIVE CRIME AS THAT TERM IS DEFINED IN SUBSECTION (7).

(B) AN OFFENSE THAT DID NOT INVOLVE THE USE OR POSSESSION OF A WEAPON.

(C) AN OFFENSE THAT DOES NOT CARRY A MAXIMUM PENALTY OF 10 OR MORE YEARS IMPRISONMENT.

(12) ~~(11)~~ Upon the entry of an order under this section, the applicant is considered not to have been previously adjudicated, except as provided in subsection ~~(13)~~ **(14)** and as follows:

(a) The applicant is not entitled to the remission of any fine, costs, or other money paid as a consequence of an adjudication that is set aside.

(b) This section does not affect the right of the applicant to rely upon the adjudication to bar subsequent proceedings for the same offense.

(c) This section does not affect the right of a victim of an offense to prosecute or defend a civil action for damages.

(d) This section does not create a right to commence an action for damages for detention under the disposition that the applicant

served before the adjudication is set aside under this section.

(13) ~~(12)~~ Upon the entry of an order under this section, the court shall send a copy of the order to the arresting agency and the department of state police.

(14) ~~(13)~~ The department of state police shall retain a nonpublic record of the order setting aside an adjudication for a juvenile offense that would be a felony if committed by an adult and not more than 2 juvenile offenses that would be misdemeanors if committed by an adult or if there is no adjudication for a felony if committed by an adult, not more than 3 adjudications for an offense that would be a misdemeanor if committed by an adult and of the record of the arrest, fingerprints, adjudication, and disposition of the applicant in the case to which the order applies. Except as provided in subsection ~~(14),~~ **(15)**, this nonpublic record shall be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes:

(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.

(b) Consideration by a law enforcement agency if a person whose adjudication has been set aside applies for employment with the law enforcement agency.

(c) To show that a person who has filed an application to set aside an adjudication has previously had an adjudication set aside under this section.

(d) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.

(e) Consideration by the governor, if a person whose adjudication has been set aside applies for a pardon for another offense.

(15) ~~(14)~~ A copy of the nonpublic record created under subsection ~~(13)~~ **(14)** shall be provided to the person whose adjudication is set aside under this section upon payment of a fee determined and charged by the department of state police in the same manner as the fee prescribed in section 4 of the freedom of information act, 1976 PA 442, MCL 15.234.

(16) ~~(15)~~ The nonpublic record maintained under subsection ~~(13)~~ **(14)** is exempt from disclosure under the freedom of information act, 1976 PA 442, MCL 15.231 to 15.246.

(17) ~~(16)~~ Except as provided in subsection ~~(13),~~ **(14)**, a person, other than the applicant, who knows or should have known that an adjudication was set aside under this section, who divulges, uses, or publishes information concerning an adjudication set aside under this section is guilty of a misdemeanor.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

Public Policy Position
HB4433

Explanation

MCL 712A.18e governs juvenile expungements, setting forth the requirements, restrictions, and procedure for having the adjudication of juvenile offenses set aside. HB 4433 proposes an amendment to MCL 712A.18e that would simplify the juvenile expungement procedure by eliminating the expungement hearing in cases where the underlying offense are not assaultive, do not involve a weapon, and carry a maximum penalty less than 10 years imprisonment. While allowing these expungements will benefit many juvenile offenders, the ATJ Policy Committee recommends the following amendments to ensure that the bill is clear and adequately protects crime victims.

1. The bill's wording is unclear as to the offenses that qualify for the summary procedure on an application to set aside an adjudication. The committee believes that any one of the three circumstances listed in subsection 11(a)-(c) should disqualify an offense from the summary procedure the bill would create. However, the negative construction used in that subsection may lead some judges to apply the summary procedure only if the offense meets all of the three listed categories (i.e., the offense is a non-assaultive crime with a penalty of less than 10 years imprisonment that did not involve use of a weapon). Under this latter interpretation, a person who committed the assaultive crime of felony stalking could invoke the summary proceeding because this crime is only subject to a 5-year prison term. This latter interpretation is of great concern to the committee, especially in cases involving stalking behavior, which may indicate of a high degree of risk to the victim.

2. Victims of the offense at issue in an application to set aside an adjudication under the bill should have an opportunity to request a hearing on the application. Art I, sec. 24 of the Michigan Constitution sets forth the rights of crime victims in our state. Among these are "the right to be reasonably protected from the accused throughout the criminal justice process," and "the right to notification of court proceedings." Suppression of criminal history records can mask patterns of abusive behavior, with negative impacts on victim safety. This is especially true when the victim and offender have ongoing contact with one another in the context of a dating or family relationship, where the risk of re-offense is high. Victims have a constitutional right to be notified of court proceedings to set aside adjudications of offenses against them, and to inform the court of safety concerns they have.

3. The list of crimes that are disqualified from the bill's summary procedure should be expanded to include certain felonies and misdemeanors that are not "assaultive crimes" as defined in the bill, but are often committed in the context of dating violence, sexual abuse, or family violence.[i] Most of these are serious misdemeanors, but animal cruelty is a 4-year felony that is often committed as a means of intimidating family members or dating partners, and is indicative of an elevated risk of serious harm to the animals' owners as well as to members of the general public. Addition of animal cruelty to the list of disqualified crimes also would require an amendment to the victim notice provisions in subsection (7).

4. Victims of the offense at issue in an application to set aside an adjudication should not be subject to misdemeanor penalties for disclosing information about the offense after the adjudication has been set aside. The provision for misdemeanor penalties in the current statute violates victims' constitutional right to freedom of speech. Moreover, this provision chills victim communications with law enforcement officials, helping professionals, friends, and family members that could be critical to victim safety and/or healing in the aftermath of an offense. The committee notes that the adult expungement statute, MCL 780.623, contains a provision exempting victims of an offense from its penalties for disclosing information about a criminal conviction that has been set aside.[ii]

The committee's proposed amendments are detailed in the enclosed redline.

Number who voted in favor and opposed to the position:
Voted For position: 17
Voted against position: 1
Abstained from vote: 1
Did note vote: 7

***Keller* Explanation**
HB 4433 is permissible under *Keller*, as it improves the functioning of the courts. By not requiring a hearing for certain expungements, the bill will increase judicial efficiency for handling petitions to set aside convictions. Further, for indigent juvenile offenders, HB 4433 improves access to courts and their ability to obtain expungements, as it removes the financial burden of traveling to court for a required hearing.

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Contact Person: Lorray S.C. Brown
Email: lorrayb@mplp.org

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[i] An assaultive crime is an offense against a person listed in MCL 770.9a. The listed crimes are:

- MCL 750.81c(3) (Felony assault of an MDHHS employee acting in the course of duty).
- MCL 750.82 (Felony assault with a dangerous weapon).
- MCL 750.83 (Assault with intent to commit murder).
- MCL 750.84 (Assault with intent to do great bodily harm less than murder, including strangulation).
- MCL 750.86 (Assault with intent to maim).
- MCL 750.87 (Assault with intent to commit burglary or any other felony).
- MCL 750.88 (Unarmed robbery).
- MCL 750.89 (Armed robbery).
- MCL 750.90a, and .90b(a) or (b) (Assaults against a pregnant woman).
- MCL 750.91 (Attempted murder).
- MCL 750.200 to 750.212a (Crimes involving explosives, bombs and harmful devices).
- MCL 750.316, .317 (First, second degree murder).
- MCL 750.321 (Manslaughter)

- MCL 750.349, .349a, and .350 (Kidnapping, prisoner taking a person hostage, taking a child under age 14).
- MCL 750.397 (Mayhem).
- MCL 750.411h(2)(b) or (3), and 750.411i (Stalking offenses).
- MCL 750.520b, .520c, .520d, .520e, and .520g, (Criminal sexual conduct 1st – 4th degrees, assault with intent to commit CSC in the 1st- 3rd degees).
- MCL 750.529, .529a, and .530 (Larceny using violence or force or a dangerous weapon, carjacking).
- MCL 750.543a to 750.543z (Violations of Michigan Anti-terrorist Act).

[ii] Regarding the misdemeanor penalties for disclosing an adjudication that was set aside, the adult statute, MCL 780.623 states in pertinent part:

…

(2) The department of state police shall retain a nonpublic record of the order setting aside a conviction and of the record of the arrest, fingerprints, conviction, and sentence of the applicant in the case to which the order applies. Except as provided in subsection (3), this nonpublic record shall be made available only to a court of competent jurisdiction, an agency of the judicial branch of state government, the department of corrections, a law enforcement agency, a prosecuting attorney, the attorney general, or the governor upon request and only for the following purposes:

(a) Consideration in a licensing function conducted by an agency of the judicial branch of state government.

(b) To show that a person who has filed an application to set aside a conviction has previously had a conviction set aside under this act.

(c) The court's consideration in determining the sentence to be imposed upon conviction for a subsequent offense that is punishable as a felony or by imprisonment for more than 1 year.

(d) Consideration by the governor if a person whose conviction has been set aside applies for a pardon for another offense.

(e) Consideration by the department of corrections or a law enforcement agency if a person whose conviction has been set aside applies for employment with the department of corrections or law enforcement agency.

(f) Consideration by a court, law enforcement agency, prosecuting attorney, or the attorney general in determining whether an individual required to be registered under the sex offenders registration act, 1994 PA 295, MCL 28.721 to 28.736, has violated that act, or for use in a prosecution for violating that act.

…

(5) Except as provided in subsection (2), a person, other than the applicant or a victim, who knows or should have known that a conviction was set aside under this section and who divulges, uses, or publishes information concerning a conviction set aside under this section is guilty of a misdemeanor punishable by imprisonment for not more than 90 days or a fine of not more than $500.00, or both.

(6) As used in this section, "victim" means any individual who suffers direct or threatened physical, financial, or emotional harm as the result of the offense that was committed by the applicant.

HB 4433 of 2017
Access to Justice Policy Committee
Proposed Amendments

Based on the recommendations set forth in the Access to Justice Policy Committee's position statement, the committee recommends the following changes to HB 4433 (proposed changes shown in all caps, bold, and underline):

MCL 712A.18e:

[(1) – (6) omitted; ATJ Policy does not have any recommended amendments.]

(7) A copy of the application shall be served upon the attorney general and, if applicable, upon the office of the prosecuting attorney who prosecuted the offense. The attorney general and the prosecuting attorney shall have an opportunity to contest the application. If the adjudication was for an offense that if committed by an adult would be an assaultive crime, ~~or~~ **A** serious misdemeanor, **OR AN OFFENSE UNDER MCL 750.50B** and if the name of the victim is known to the prosecuting attorney, the prosecuting attorney shall give the victim of that offense written notice of the application and forward a copy of the application to the victim **AS PROVIDED IN** ~~under~~ section 46a of the William Van Regenmorter crime victim's rights act, 1985 PA 87, MCL 780.796a. The notice shall be sent by first-class mail to the victim's last known address. The victim has the right to appear at any proceeding under this section concerning that adjudication and to make a written or oral statement.

[(8) - (10) omitted; ATJ Policy Committee does not have any recommended amendments.]

(11) NOTWITHSTANDING SUBSECTION (9), **AND UNLESS A HEARING IS REQUESTED BY A PART OF THE VICTIM OF THE OFENSE AT ISSUES IN THE**

APPLICATION, THE COURT MAY~~SHALL~~, WITHOUT **HOLDING A HEARING, SET ASIDE THE ADJUDICATION OF A PERSON WHO** OTHERWISE MEETS THE REQUIREMENTS OF THIS SECTION, IF THE ADJUDICATION DOES NOT INVOLVE ANY OF THE FOLLOWING: ~~WAS ADJUDICATED FOR ANY OF THE FOLLOWING OFFENSES IF THE PERSON FILES AN APPLICATION WITH THE COURT AND OTHERWISE MEETS THE REQUIREMENTS OF THIS SECTION:~~

(A) ~~AN OFFENSE THAT IS NOT~~ **AN ASSAULTIVE CRIME AS THAT TERM IS DEFINED IN SUBSECTION (7).**

(B) AN OFFENSE DEFINED IN MCL 750.50b.

C~~B~~) **AN OFFENSE** ~~THAT DID NOT~~ **INVOLVING~~E~~ THE USE OR POSSESSION OF A WEAPON.**

(D~~C~~) **AN OFFENSE THAT** CARRIES ~~DOES NOT CARRY~~ **A MAXIMUM PENALTY OF 10 OR MORE YEARS IMPRISONMENT.**

(E) ANY OF THE FOLLOWING OFFENSES:

i. AN OFFENSE UNDER MCL 750.81(2)-(5).

ii. AN OFFENSE UNDER MCL 750.81a(2)-(3).

iii. AN OFFENSE UNDER MCL 750.335a.

iv. AN OFFENSE UNDER MCL 750.411h(2)(a).

v. A VIOLATION OF A LOCAL ORDINANCE SUBSTANTIALLY CORRESPONDING TO THE STATUTES LISTED IN SUBSECTIONS (I)-(IV).

vi. A VIOLATION CHARGED AS A CRIME OR SERIOUS MISDEMEANOR UNDER SUBSECTIONS (I)-(IV) OR SUBSTANTIALLY CORRESPONDING ORDINANCES, BUT SUBSEQUENTLY REDUCED TO OR PLEADED TO AS A

MISDEMEANOR.

[(12) – (16) omitted; ATJ Policy Committee does not have any recommended amendments.]

(17) ~~(16)~~ Except as provided in subsection ~~(13),~~ **(14),** a person, other than the applicant OR A VICTIM, who knows or should have known that an adjudication was set aside under this section, who divulges, uses, or publishes information concerning an adjudication set aside under this section is guilty of a misdemeanor.

Enacting section 1. This amendatory act takes effect 90 days after the date it is enacted into law.

(18) AS USED IN THIS SECTION, "VICTIM" MEANS ANY INDIVIDUAL WHO SUFFERS DIRECT OR THREATENED PHYSICAL, FINANCIAL, OR EMOTIONAL HARM AS THE RESULT OF THE OFFENSE THAT WAS COMMITTED BY THE APPLICANT.

PUBLIC POLICY POSITION
HB 4433

The Criminal Jurisprudence & Practice Committee does not believe HB 4433 is *Keller*-permissible. However, should the Board find it Keller-permissible, the Committee opposes the bill.

The majority of the Committee agreed that HB 4433 is not *Keller*-permissible because the bill only marginally affects the functioning of the court and instead is more substantive in nature by granting new rights to juvenile offenders and circumventing the rights of crime victims. In addition, the State Bar should not take a position on this legislation because the subject matter is divisive among the membership.

However, the Committee also agreed that should the State Bar find the bill *Keller*-permissible and take a position, the Bar should oppose this bill because it ignores the rights of the crime victim to comment on the expunction and the prosecutor's right to contest. The bill also presents some confusion into the duties of the court, as some bill sections assume the existence of a hearing on expunction, while the amended section states that the court is required to set aside an offense without any hearing.

Number who voted in favor and opposed to the position that the bill is not Keller permissible:
12 Voted for position
4 Voted against position
0 Abstained from vote
0 Did not vote (absent)

Number who voted in favor and opposed to the position to oppose this bill:
11 Voted for position
3 Voted against position
1 Abstained from vote
1 Did not vote (absent)

Contact person: Nimish R. Ganatra

Email: ganatran@ewashtenaw.org

PUBLIC POLICY POSITION
HB 4433

The Criminal Law Section Supports HB 4433

The Section supports HB 4433 because it comports with the notions of justice and would allow for the efficient administration of justice.

Number who voted in favor and opposed to the position:
14 Voted for position
3 Voted against position
0 Abstained from vote
0 Did not vote (absent)

***Keller* Explanation**
The Section's position on HB 4433 is permissible under *Keller* because it would improve of the functioning of the courts by increasing the efficiency with which petitions to set aside convictions are handled.

Contact person: Joshua Blanchard

Email: josh@mielcarr.com

SBM STATE BAR OF MICHIGAN

To: Members of the Public Policy Committee
Board of Commissioners

From: Janet Welch, Executive Director
Peter Cunningham, Director of Governmental Relations
Kathryn Hennessey, Public Policy Counsel

Date: January 17, 2018

Re: HB 4728

Background
HB 4728 would create a nonprofit legal organization and fund to provide legal services in deportment and removal proceedings. SCAO would enter into contracts with non-profit legal services organizations and administer funding for legal services provided to individuals in deportment or removal proceedings.

***Keller* Considerations**
HB 4728 increases the availability of legal services by offering funding for SCAO to contract with legal services organizations to provide legal services to individuals involved in deportment or removal proceedings. The Access to Justice Policy Committee reviewed this bill and recommended it was *Keller* permissible because it would increase the availability of legal services to those unable to retain legal counsel in these proceedings.

***Keller* Quick Guide**

THE TWO PERMISSIBLE SUBJECT-AREAS UNDER *KELLER*:	
Regulation of Legal Profession	**Improvement in Quality of Legal Services**
As interpreted by AO 2004-1	
• Regulation and discipline of attorneys	• Improvement in functioning of the courts
• Ethics	✓ Availability of legal services to society
• Lawyer competency	
• Integrity of the Legal Profession	
• Regulation of attorney trust accounts	

Staff Recommendation
The bill satisfies the requirements of *Keller* and may be considered on its merits.

HOUSE BILL No. 4728

June 8, 2017, Introduced by Reps. Geiss, Hammoud, LaGrand, Love, Chang, Neeley, Peterson, Gay-Dagnogo, Sabo, Cochran, Rabhi, Wittenberg, Howrylak, Byrd, Sowerby, Moss, Green and Jones and referred to the Committee on Judiciary.

A bill to create the nonprofit legal organization contract act; to create the nonprofit legal organization contract fund; to provide for use of the fund; and to provide for the powers and duties of certain state and local governmental officers and entities.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "nonprofit legal organization contract act".

Sec. 2. As used in this act:

(a) "Individual in removal proceedings" means an individual who is in removal proceedings under section 240 of the federal immigration and nationality act, 8 USC 1229a, before a federal immigration judge that is located in this state, an individual who

HOUSE BILL No. 4728

is arrested by Immigration and Customs Enforcement within this state and placed in expedited removal proceedings, an individual who is paroled into the United States at or near a port of entry in this state for purposes of removal proceedings, any individual detained by United States Customs and Border Protection at any port of entry in this state, including, but not limited to, when the port of entry is at an airport, on land, or at sea, or an individual who is a party to an appeal made to the Board of Immigration Appeals, the United States Sixth Circuit Court, or a federal district court in this state arising from those proceedings.

(b) "Legal services" means services provided by a licensed attorney to an individual who is being detained for deportation proceedings, beginning with the individual's initial detention through a court's final deportation determination.

(c) "Legal training and technical assistance" includes, but is not limited to, webinars, in-person trainings, mentoring, removal defense boot camps, and technical assistance in the form of answering questions via electronic mail, fax, or telephone from organizations described in section 4(1) and their staff and volunteers who assist individuals with removal defense.

(d) "Stakeholder" includes, but is not limited to, nonprofit legal services organizations with experience in immigration removal defense and nonprofit organizations with experience in public policy impacting immigrants.

(e) "Violent felony" means that term as defined in section 36 of the corrections code of 1953, 1953 PA 232, MCL 791.236.

Sec. 3. (1) The state court administrative office shall either contract directly with qualified nonprofit legal services organizations, or contract with a nonprofit agency to administer funding to nonprofit legal services organization subcontractors, to provide legal services to individuals in removal proceedings who are not otherwise entitled to legal representation under an existing local, state, or federal program. The state court administrative office may prioritize the award of contracts to provide legal services for detained individuals in removal proceedings. The state court administrative office may prioritize the award of contracts to qualified nonprofit legal services organizations that also receive county or city funding to provide legal services to individuals in removal proceedings.

(2) The state court administrative office may consult with stakeholders to determine the prioritization of funding based on specified factors, including, but not limited to, the income of an individual in removal proceedings. The state court administrative office shall prioritize the award of contracts to provide legal services for any of the following:

(a) Detained individuals who have a parent, spouse, or child who is a citizen or legal permanent resident of the United States.

(b) Veterans of the United States military and their spouses.

(c) Individuals who have a claim for political asylum.

(d) Individuals who have longstanding ties to the United States or who are eligible for relief under the federal deferred action for childhood arrivals program. The state court administrative office shall, in consultation with stakeholders,

define the term "longstanding ties" for the purposes of this subdivision.

(3) The state court administrative office may request proposals for agencies to act as the umbrella agency in order to determine whether an umbrella agency model is more efficient than contracting directly with individual organizations.

(4) Funds provided under a contract awarded under this section must not be used to provide legal services to an individual who has a final conviction for, or who is currently appealing a conviction for, a violent felony.

Sec. 4. (1) A contract awarded under section 3 must be executed either with a nonprofit agency that will administer funding to nonprofit legal services organization subcontractors that meet both of the following requirements, or directly with nonprofit legal services organizations that meet both of the following requirements:

(a) Have significant experience in representing individuals in removal proceedings and asylum applications. As used in this subdivision, "significant experience" means at least 1 of the following:

(*i*) A minimum of 5 years of experience as an organization.

(*ii*) Experience as a federal subcontractor for immigration representation.

(*iii*) Experience working with or under the supervision of an organization, including a legal training or a technical assistance organization, that has significant experience in removal defense.

(b) Are accredited by the Board of Immigration Appeals under

the United States Department of Justice's Executive Office for Immigration Review.

(2) The state court administrative office may contract with organizations that provide legal training and technical assistance to other organizations qualified under subsection (1).

(3) Legal services organizations that provide legal training and technical assistance must have at least 10 years of experience conducting immigration legal services trainings and technical assistance specifically on removal defense.

(4) The state court administrative office may contract with organizations that provide postconviction relief services to immigrants. Organizations with contracts under this subsection may be criminal defense organizations that file postconviction relief motions and petitions in this state.

(5) The state court administrative office may contract with organizations that provide case coordination and placement services to ensure that all individuals eligible for representation under a contract entered into under section 3 or this section receive that representation in a timely fashion.

Sec. 5. (1) The nonprofit legal organization contract fund is created within the state treasury.

(2) The state treasurer may receive money or other assets from any source for deposit into the fund. The state treasurer shall direct the investment of the fund. The state treasurer shall credit to the fund interest and earnings from fund investments.

(3) Money in the fund at the close of the fiscal year must remain in the fund and must not lapse to the general fund.

(4) The state court administrative office shall be the administrator of the fund for auditing purposes.

(5) The state court administrative office shall expend money from the fund, upon appropriation, only for 1 or more of the following purposes:

(a) To carry out its duties under this act.

(b) To award contracts as provided in section 3 and 4.

Enacting section 1. This act takes effect 90 days after the date it is enacted into law.

Public Policy Position
HB 4728

The Access to Justice Policy Committee Supports HB 4728.

Explanation
HB 4728 would create a nonprofit legal organization and fund to provide legal services in immigration deportment and removal proceedings. Deportment and removal proceedings involve some of the most fundamental interests of individuals, including individuals' ability to remain living in the same country as their family. Because this bill would increase the availability of legal services to individuals facing deportment or removal, the Access to Justice Committee unanimously supports HB 4728.

Number who voted in favor and opposed to the position:
Voted For position: 18
Voted against position: 0
Abstained from vote: 0
Did note vote: 8

***Keller* Explanation**
HB 4728 is *Keller*-permissible because it would increase the availability of legal services to those unable to retain legal counsel in deportment and removal proceedings.

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